**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**FIRST REGION**

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| In the Matter of<br><br>FEDEX HOME DELIVERY, A SEPARATE OPERATING DIVISION OF FEDEX GROUND PACKAGE SYSTEM, INC.<br><br>Employer[1]<br><br>and<br><br>INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION 25<br><br>Petitioner | Cases 1-RC-22034<br>1-RC-22035 |

## DECISION AND DIRECTION OF ELECTION[2]

In these cases, the Union seeks to represent two separate bargaining units consisting of route drivers and swing drivers, one unit at the FedEx Home Delivery (the Employer, FedEx Home, or FHD) terminal located at 8 Jewel Drive, in Wilmington,

[1] The name of the Employer appears as amended at the hearing.

[2] Upon petitions duly filed under Section 9(c) of the National Labor Relations Act, as amended, a consolidated hearing was held before hearing officers of the National Labor Relations Board. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

Upon the entire record in this proceeding, I find that: 1) the hearing officers' rulings made at the hearing are free from prejudicial error and are hereby affirmed; 2) the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this matter; 3) the labor organization involved claims to represent certain employees of the Employer; and 4) a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

Massachusetts, and the other unit at the FedEx Home terminal located at 375 Ballardvale Street, in Wilmington, Massachusetts.[3]

FedEx Home, which refers to most of these drivers as "contractors," contends, as it has previously done in a number of other cases involving various other FedEx Home terminals owned by it, that all of the drivers who are FedEx Home contractors, including the Wilmington drivers at issue here, are independent contractors and, therefore, not employees within the meaning of Section 2(3) of the Act. FedEx Home also contends that those contractors who operate multiple routes rather than single routes should be excluded from the units on the alternative ground that they are statutory supervisors. The Union seeks to include both multiple route and single route contractors in the unit.

Finally, the Union seeks to include in the units "second and third route drivers." It appears that, by this term, the Union refers to those drivers who are hired by multiple route contractors to operate the multiple route contractors' routes on an ongoing basis.[4] The Employer maintains that such drivers should be excluded from the units on the ground that they are not employees of FedEx Home and, alternatively, that they lack a community of interest with the contractors. At the end of the hearing, however, the

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[3] I note that the facility at 8 Jewel Drive in Wilmington is sometimes referred to as the "Boston" terminal, and the facility at 375 Ballardvale Street in Wilmington is sometimes referred to as "the Annex." I shall refer to these terminals as the Jewel Drive terminal and the Ballardvale terminal.

[4] It appears that the Union does not seek to represent substitute drivers who are occasionally hired by both multiple route and single route contractors to cover for temporary absences. The Union also asserts that it does not seek to represent "supplemental" drivers who are hired by contractors to operate an additional truck on their route during busy seasons such as the Christmas season. Finally, the Union does not seek to represent "terminal temp" drivers who are paid by a company called Kelly Services and used by FedEx Home to drive when FedEx Home determines that the extra volume of work warrants it.

parties took the position that drivers hired by multiple route contractors should be permitted to vote subject to challenge.

I find that the FedEx Home contractors at the two Wilmington terminals are statutory employees rather than independent contractors. I further find that those contractors who operate multiple routes and who, therefore, regularly employ drivers to operate routes for them, should be excluded from the units as statutory supervisors. As for the drivers regularly employed by the multiple route contractors, I find, for the reasons set forth below, that they are employees of FedEx Home. Because the record is insufficient to establish whether these drivers share a sufficient community of interest with the contractors to be included in the units, I shall permit them to vote subject to challenge.

**PROCEDURAL MATTERS**

In three recent cases, Board affirmed the conclusions of Regional Directors that FedEx contractors were statutory employees rather than independent contractors. In *FedEx Ground Package Systems, Inc.*, Case 22-RC-12508, issued on November 2, 2004, the Regional Director for Region 22 found that pickup and delivery and line haul contractors employed by FedEx Ground at its Fairfield, New Jersey Ground facility, also referred to as its "Paterson" terminal, were statutory employees. I take administrative notice of the fact that, on January 26, 2005, the Board denied FedEx Ground Package System's request for review of that Decision.

In *FedEx Home Delivery*, Case 4-RC-20974, issued on June 1, 2005, the Regional Director for Region 4 determined that contractors who worked at FedEx Home's Barrington, New Jersey terminal were statutory employees. I take administrative notice

of the fact that, on August 3, 2005, the Board denied FedEx Home's request for review of the Regional Director's determination that the contractors were statutory employees, remanding the case to the Regional Director solely with respect to the joint employer and supervisory status of four multiple-route contractors.[5]

In *FedEx Home Delivery, a Separate Operating Division of Fedex Ground Package System, Inc.*, Case 1-RC-21966, issued on January 24, 2006, I found that contractors who worked at a FedEx Home terminal in Northboro, Massachusetts, referred to as the "Worcester" terminal, were statutory employees rather than independent contractors. I take administrative notice of the fact that FedEx Home requested review of my Decision and that, on March 23, 2006, the Board issued its Order affirming my determination that the Worcester contractors were statutory employees.

In the Worcester case, the prior Decisions from Regions 4 and 22 were put into evidence, and the hearing officer notified the parties that I would consider the facts developed in those cases as applicable to the Worcester terminal, unless they were distinguished. In the Worcester Decision, I relied on facts developed in the prior New Jersey cases solely to the degree that they had general applicability to FedEx terminals nationwide, such as facts concerning corporate-wide policies and the "Operating Agreement" signed by FedEx Home contactors, which is identical nationwide. In its order, the Board found that I had correctly declined, for reasons of administrative economy, to permit FedEx Home to relitigate facts applicable to all FedEx Home facilities recently established in other cases. Accordingly, in this matter, I shall similarly

[5] I take administrative notice of the fact that, on September 21, 2005, the Regional Director for Region 4 issued a Supplemental Decision in which she found that the multiple-route contractors should be excluded from the unit as joint employers of the drivers they hired and/or as statutory supervisors of FedEx Home, and that no party requested review of her Supplemental Decision.

rely on the three prior Decisions to establish such facts, except to the degree that the record in this case demonstrates that there have been changes since the prior cases, that they were incorrect, or that there is some other basis for distinguishing them.[6] I note that I have relied primarily on the Worcester case and the Barrington, New Jersey case, which both, like this case, involved home delivery operations. I have either paraphrased the facts from those decisions on which I rely or, in some instances, set them forth verbatim as they appear in the prior decisions.

In its March 23, 2006 Order, however, the Board did find that I had erred with respect to certain procedural rulings in the Worcester case. In this regard, the Board found that, having relied on the prior Decisions from Regions 4 and 22, it was error to affirm the hearing officer's refusal to admit the transcripts from those prior FedEx cases, which may be necessary to aid the Board and the parties in subsequent enforcement proceedings. Accordingly, the entire records from the Worcester, Paterson, and Barrington cases are included in and made part of the record in this matter.

Further, the Board found that I had erred in affirming the hearing officer's refusal to allow FedEx Home to present evidence of route sales that had occurred in Barrington and Paterson since the close of the records in those cases, finding that once I had determined to rely on the facts found in those prior cases, the parties should have been permitted to litigate any subsequent changed circumstances. Accordingly, FedEx Home was permitted in the instant case to present evidence concerning route sales and other

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[6] In the Worcester case, the Region 4 and 22 decisions were actually made part of the record. In this case, the hearing officer did not put any of the prior decisions into the record, but took administrative notice of the record in the Worcester decision, which itself incorporated the Region 4 and 22 decisions.

changed circumstances since the close of the records in the Worcester, Barrington, and Paterson cases. In addition, FedEx Home submitted a proffer concerning evidence of route sales and other types of entrepreneurial activities at Barrington, Paterson, and various other terminals.[7]

Notwithstanding the Board's finding that it was error not to permit such evidence to be introduced in the Worcester case,[8] the Board agreed in its Order with my determination that evidence of route sales and entrepreneurial activity at other terminals had no bearing on the economic value of route sales at the Worcester terminal, and found that I properly limited my consideration of such evidence to route sales in Worcester. Accordingly, in this matter, I have similarly limited my consideration of such evidence to route sales and other entrepreneurial activity at the Wilmington, Massachusetts facilities at issue in these petitions.

## INDEPENDENT CONTRACTOR STATUS OF CONTRACTORS

### FedEx Home Operations

As noted in the Region 4 Decision, the Employer was established in about 1998, when FedEx Corporation acquired Roadway Package Systems, Inc. FedEx has two operating divisions: the Ground Division and FedEx Home. The Ground Division delivers packages of up to 150 pounds, principally to business customers. FedEx Home delivers packages of up to 75 pounds, mostly to residential customers. The two Wilmington home delivery terminals at issue in this case are part of FedEx Home, which

[7] The record in this matter was left open for the limited purpose of receiving the Employer's proffer into evidence. I hereby receive the Employer's proffer into the record, which is now closed.

[8] The Board found that the Region should have taken this evidence, which would create a complete record in the event of future appeals to the Board or the courts.

operates 300 stand-alone terminals throughout the United States, as well as 200 terminals that share space with Ground Division facilities. FedEx Home has agreements with about 4000 contractors nationwide who deliver packages on 4400 routes.[9]

The Jewel Drive terminal services a geographic area north of the City of Boston up to the New Hampshire border. Senior manager Donald Clark is the highest ranking FedEx Home manager at the Jewel Drive facility. Pickup and Delivery Manager Matthew Drake reports to Clark and oversees 22 contractors who operate 24 routes. The facility also uses about three "temp" drivers from Kelly Services when there is a spike in the volume of work that the contractors cannot handle. Fourteen part-time package handlers at Jewel Drive report to Dock Service Manager Brian Borowski.[10]

The Ballardvale terminal, which opened in October 2005, and is sometimes referred to as the Wilmington Annex, services the City of Boston and outlying areas.[11] The terminal has both a FedEx Ground and FedEx Home operation on separate sides of the same building. Pickup and Delivery Manager Cal Busby is the highest-ranking representative of FedEx Home at the Ballardvale terminal. Pickup and Delivery Service Manager Tiffany Tropp oversees 16 contractors at Ballardvale who operate 16 routes.

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[9] In its proffer, FedEx has updated the figures, asserting that there were 5049 routes and 3826 contractors as of August 2006.

[10] It appears that the Union does not seek to represent the package handlers at either Wilmington facility.

[11] FedEx Home opened the Ballardvale facility in October 2005, because the Jewel Drive facility had become too small for the number of vans required to handle an increase in volume there. At that time, 14 of the 33 routes then based at Jewel Drive were transferred to Ballardvale, leaving 19 routes at Jewel Drive. A few more routes have been added to each facility since then. It is unclear from the record why the Jewel Drive facility, which is not located in Boston and does not service the City of Boston, is referred to as the "Boston" facility.

The record does not reveal how many, if any, temp drivers work there. Dock Manager Anand Dave oversees eight package handlers.

Recruitment and Training of Contractors

As indicated above, FedEx Home uses "temp" drivers who are paid by a temporary agency called Kelly Services[12] to meet a higher demand during the Christmas season and other holidays, to cover for contractors' routes when necessary, and to cover areas that are not assigned to contractors. It appears that many, if not most, FedEx Home contractors begin their careers with the company as "temp" drivers, and at some later point obtain a vehicle and become contractors. According to the facts developed in the Region 4 Decision, FedEx Home follows the same procedure nationwide in recruiting and training both contractors and temporary employees.

FedEx Home advertises that it is interested in individuals who have "dreamed of running" their own businesses, possess "an entrepreneurial spirit," and are interested in functioning as an "independent contractor." At informational meetings, FedEx Home recruiters emphasize that FedEx Home is seeking an independent contractor relationship and explain the terms of the relationship. FedEx Home seeks individuals who want to be more than just delivery drivers and have an "entrepreneurial spirit."

Candidates who are interested in becoming either a contractor or a temporary driver complete a computerized application at the terminal to which they wish to apply. The terminal checks both the driving and criminal records of applicants, as required by

[12] In the prior FedEx Home cases, the Employer used a temporary agency called "Adecco" to supply temp drivers, but the two terminals at issue in this case use Kelly Services.

the Federal Motor Carrier Safety Regulations,[13] often referred to as Department of Transportation (DOT) regulations, which apply to interstate carriers such as FedEx Home. The New England terminals, including the two at issue in this case, forward the results to Regional Maintenance and Safety Manager Michael Carey for his review.[14] Those candidates with driving and criminal records that are acceptable per the DOT regulations are asked to take a physical examination[15] and undergo drug screening tests,[16] which are also required by the DOT regulations.

All applicants who pass the above requirements must complete a FedEx Home driver-training course, required by DOT, which is called "Quality Packaging Delivery Learning" (QPDL).[17] FedEx Home may exempt applicants who have a minimum of one

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[13] In the Worcester case, it appeared that DOT regulations required FedEx Home to obtain the applicants' driving records, but did not require a criminal background check. Regional Maintenance and Safety Manager Michael Carey testified at the hearing in this matter that the DOT regulations also require the criminal background check.

[14] Carey testified that DOT regulations apply to drivers of vehicles over 10,000 pounds. The regulations state, however, that motor carriers can go beyond DOT requirements, and it is FedEx Home policy to apply these requirements to vehicles under 10,000 pounds as well. Most, but not all, FedEx Home vehicles are over 10,000 pounds.

[15] The FedEx Home Safe Driving Program, which is part of the Operating Agreement signed by all contractors, discussed in detail below, states that all contractors must undergo a physical examination completed by a qualified physician approved by FedEx Home at least every two years. Carey testified that a physical is required every three years if there are no medical issues. Managing Director of Contractor Relations Tim Edmonds testified that FedEx Home is responsible for ensuring that the physician is qualified to perform a DOT physical and that not all physicians are qualified. The contractors bear the cost of the physical.

[16] The FedEx Home Safe Driving Program requires all FedEx Home contractors to submit to a drug screen administered at such time and place and in such manner as determined by FedEx Home. Carey testified that FedEx Home administers quarterly random drug tests on all its contractors and drivers.

[17] FedEx Home's managing director of contract relations, Timothy Edmonds, testified at the hearing in this matter that individuals who are applying to be seasonal or "temp" drivers for FedEx Home are paid by Kelly Services to take QPDL. Edmonds testified that prospective contractors are not paid to take QPDL, but Carey testified that this scenario would happen infrequently; in most cases, prospective contractors begin their relationship with FedEx Home as

year of commercial driving experience from the training requirement, and FedEx Home will also accept a certificate of training provided by another reputable provider in lieu of QPDL. Carey testified that the QPDL training takes 14 days. There are eight days of classroom and on-the-road training. After that, candidates do five "customer service rides" with FedEx Home managers. The training covers safe driving techniques, which is required by the DOT regulations. QPDL training also includes an orientation that covers the procedures that FedEx Home wants all its contractors to follow in making deliveries, such as how to load packages into a vehicle, tips on use of the scanner,[18] how to read road plans, and where to leave packages at a residence if nobody is home. Carey testified that these types of matters are suggestions. Those who pass the training course may choose either to acquire a vehicle and become contractors or to become temporary drivers who work for FedEx Home but are paid by Kelly Services.

The Operating Agreement

Prospective contractors who have completed or been exempt from the training and acquired an appropriate vehicle, as discussed below, may secure a route and sign a Standard Contractor Operating Agreement provided by FedEx Home.[19] All potential contractors nationwide are offered the same Agreement, which their terminal manager reviews with them in detail before they sign. Contractors may negotiate with their

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temps, because they need to complete QPDL before becoming contractors and/or because they cannot obtain a vehicle immediately, in which case Kelly Services pays for their training period. When a contractor wishes to hire a driver who needs to take QPDL, it is up to the contractor whether to pay the driver for taking the QPDL training.

[18] The scanner is a piece of equipment used by all contractors to record the location and delivery of each package during its journey.

[19] The current version of the Operating Agreement, dated June 2006, was submitted into evidence in this case.

terminal manager over which particular route is assigned to them and, as described below, over the amount of one aspect of their compensation,[20] but there is no evidence that individual contractors have the ability to negotiate any other terms of the Operating Agreement with FedEx Home.[21] Rather, the Operating Agreement is presented on a take-it-or-leave-it basis to all contractors. The body of the Operating Agreement has, by and large, remained the same over the years. FedEx Home typically makes annual changes to the addenda in the Agreement, effective in June, updating specifics such as compensation rates. All contractors are given 30 days notice to review the changes and sign the modified Agreement.

The Agreement provides that "Both FHD and Contractor intend that Contractor will provide these services strictly as an independent contractor, and not as an employee of FHD for any purpose" and that the manner and means of reaching mutual business objectives are within the discretion of the contractor. The Operating Agreement provides that FedEx Home does not have authority to direct contractors as to the manner or means employed to achieve their objectives and results. It states that FedEx Home may not prescribe hours of work, whether or when the contractors take breaks, what routes they follow, or other details of performance.[22]

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[20] As described below, contractors may attempt to negotiate an increase in a part of their compensation package called the "temporary core zone density settlement."

[21] Edmonds testified that FedEx Home made two improvements in the 2006 nationwide Agreement at the request of the contractors: 1) a provision that the core zone payment would be prorated if contractors worked fewer than a certain number of hours was eliminated; and 2) contractors who service two or more FedEx Ground, FedEx Home, or swing contractor "primary service areas" now receive a quarterly payment in the amount of $750. Edmonds did not indicate which of FedEx Home's 500 terminals the contractors' requests for changes in the Agreement originated from.

[22] See the Private Background Statement and Section 1.14 of the Operating Agreement.

Under the Operating Agreement, all contractors are responsible, however, for providing service in a manner that meets FedEx Home's nationwide standard of service. The contractors commit to provide daily delivery service in their area and to conduct their business so that they can be identified as part of the FedEx Home nationwide system. The Agreement requires all contractors to wear the FedEx Home-approved uniform, maintained in good condition, and to keep their personal appearance consistent with standards promulgated by FedEx Home. It requires the contractors to keep their vehicles in a clean and presentable fashion free of body damage and extraneous markings. All contractors must comply with specified driver safety standards.[23]

Termination of the Agreement

Contractors may choose to enter into a one- or two-year Operating Agreement. In either event, the Operating Agreement automatically renews for successive one-year terms after expiration of the initial term, unless either party gives 30-days' written notice of non-renewal. An Operating Agreement may be terminated during its term at any time by mutual agreement, by either party if the other party breaches its contractual obligations, by FedEx Home if it ceases to do business or reduces operations in the area serviced by the contractor, or by the contractors if they give 30 days' written notice. All contractors are required to place $500 in an interest-bearing escrow account controlled by FedEx Home to cover any debts owed by the contractor to FedEx Home at the time the

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[23] The Safe Driving Program included in the Operating Agreement lists 25 acts or omissions related to safe driving. FedEx Home may suspend drivers (apparently whether or not they are contractors) for 15 days at its sole discretion based upon reasonable inquiry with respect to any of the 25 acts or omissions that would constitute an offense of law, pending the filing of charges against the driver. If charges are filed, the suspension continues until final determination by a court.

Operating Agreement is terminated, and which FedEx Home may also retain as liquidated damages if the contractor terminates the Operating Agreement without the requisite 30-day notice.

Edmonds testified in the Worcester case that FedEx Home contractors are not subject to reprimands or other discipline. If contractors fail to live up to their contractual obligations, their terminal manager holds a "business discussion" with them to try to resolve the problem. If terminal managers believe a contractor's Operating Agreement should be terminated, various more senior managers of FedEx Home must approve their recommendation. All contractors are entitled to seek arbitration of disputes over FedEx Home's decision to terminate their Operating Agreement.

Vehicles

Prior to becoming contractors, all contractors are required to purchase or lease a van or truck that FedEx Home approves. Regional Maintenance and Safety Manager Michael Carey approves FedEx vehicles for the New England region, including those for the two Wilmington terminals. Carey testified that no particular type of vehicle is required, although all vehicles used by FedEx contractors nationwide must meet certain requirements.[24] The vehicles must pass a yearly safety inspection. The vehicles must have a backing camera. They must have shelves running down each side in order to comply with DOT safe loading standards, as well as in order to protect the packages from damage. The vehicles must be white in color. In order to comply with DOT regulations and to foster nationwide brand name recognition, FedEx Home requires all vehicles to

[24] The type of vans and trucks most commonly described in the various FedEx cases were referred to as P-350s, P-400s, P-450, P-500s, or P-550, with the numbers referring to capacity.

carry the FedEx Home logo.[25] The logo may be permanent or it may be a removable magnetic logo. The vehicles must meet certain specifications for lights, brake pad thickness, and tire tread. FedEx Home does not specify the size of the trucks, although David Durette, a former senior manager at the Jewel Drive facility, testified that FedEx Home wants to make sure that all contractors can grow based on FedEx Home's projections, and Jewel Drive contractor Paul Tremblay testified that FedEx Home offered him a $2000 signing bonus if he would get a bigger van, which he did.

FedEx Home may provide contractors with the names of dealers in their area from which the vehicles may be leased or purchased, as well as the names of lenders willing to finance the purchases. Contractors are not obligated to patronize those dealers or lenders, however, and may purchase, lease, or borrow from other sources. FedEx Home does not itself provide financing or guarantee loans obtained by contractors.[26] Contractors at the two Wilmington terminals have obtained vehicles from dealers and by purchasing used vehicles from other contractors. Former Wilmington pickup and delivery manager Melnyk estimated that an Econoline van costs $15,000 to $18,000, a new P-450 costs about $23,000 to $25,000, a new 550 box truck costs $26,000 to $28,000, a "Workhorse" P-500 step van costs about $33,000 to $35,000, and a "Freightliner" P-500 step van costs from $36,000 to $38,000.

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[25] According to the Worcester case, however, the logo used by FedEx Home is larger than required by DOT regulation.

[26] In the Worcester decision, I noted at footnote 18 that Addendum 8 of the Operating Agreement made reference to contractors who have an "outstanding start-up loan balance." Managing Director of Contractor Relations Timothy Edmonds testified in this case that FedEx Home does not provide start-up loans, and I note that the reference to start-up loans no longer appears in Addendum 8 of the current Operating Agreement.

All contractors are responsible for all costs associated with operating and maintaining their vehicles, including fuel, tolls, repairs, taxes, registration fees, and licenses. Under the Operating Agreement, all contractors authorize FedEx Home to pay licenses, taxes, and fees on their behalf and to deduct the amount of those payments from their compensation. In order to encourage contractors to accumulate a fund from which they may pay for expenses such as vehicle maintenance and substitute operators, the Operating Agreement provides that FedEx Home will maintain and pay interest on a Service Guarantee Account into which the contractors deposit money. Pursuant to Addendum 3 of the Agreement, for each quarter in which a contractor's average balance in the account is $500 or more, FedEx Home contributes $100. Addendum 3 also provides that FedEx Home may, in its discretion, make loans to contractors to fund maintenance costs in excess of the balance in their Service Guarantee Account, up to a maximum of $5000, depending on the balance in their account.

To comply with DOT regulations, all contractors are required to submit daily driver logs and vehicle inspection reports to FedEx Home. All contractors are also required to submit to FedEx Home a monthly maintenance form to which they attach receipts for maintenance and repair work done and note tire tread depth. Per the DOT regulations, each vehicle must have an annual safety inspection by a qualified inspector, which can be done at the contractor's terminal or elsewhere. All contractors must pay for the cost of any repairs to their vehicle, as well as for the cost of renting a replacement vehicle while their own truck is being repaired.[27]

[27] Ballardvale Pickup and Delivery Manager Cal Busby testified that the Ballardvale terminal does not have any "terminal" spare or rental vehicles; Ballardvale contractors must rent a spare from a rental agency in case of a breakdown.

When using their vehicles for FedEx Home work, all contractors must use their vehicles exclusively for the carriage of FedEx Home goods and for no other purpose.[28] All contractors may use their vehicles for other commercial or personal purposes when they are not in the service of FedEx Home, so long as they remove or mask all FedEx Home logos and markings. Current Jewel Drive Senior Manager Donald Clark testified that he does not know of any current Jewel Drive contractors who use their FedEx Home vehicles for another business, nor is there any evidence that any Ballardvale contractors have ever done so. Former Jewel Drive Senior Manager David Durette testified that a former Jewel Drive multiple route contractor, Alan Douglass, used his FedEx truck for his "Douglass Delivery" delivery service, in which he delivered items such as lawn mowers for a repair company. Jewel Drive contractors Paul Tremblay and James Downs have used their FedEx trucks for personal purposes, such as helping family members move or personal shopping.

Primary Service Areas

The terminal managers establish routes, sometimes referred to as "primary service areas," or "proprietary zip codes," associated with their terminals and may offer open routes to contractors. Each contractor's Operating Agreement designates one or more primary service areas in which that contractor is entitled to operate and which he/she is responsible for serving. All contractors may negotiate with their terminal managers over requests to add or delete towns from their route. There are some towns serviced by the

[28] Edmonds, the managing director of contract relations, testified in the Worcester case that this is because DOT leasing regulations require carriers to have exclusive use and control of their vehicles. I note, however, that the Region 4 Decision stated that DOT regulations in most instances prohibit the operator of a vehicle leased to a regulated carrier from simultaneously transporting the goods of another regulated carrier, and that the Operating Agreement expanded upon this regulation.

two Wilmington terminals that are not yet part of any contractor's proprietary route. Many Wilmington contractors make deliveries both in their primary service area and in adjacent areas that are not part of the primary service area. FedEx Home may move deliveries in those towns from contractor to contractor as needed.

Under the Operating Agreement, all contractors are responsible for providing daily delivery service in their primary service area. The Operating Agreement sets forth the mutual intention of FedEx Home and the contractors to reduce the geographic size of primary service areas as the customer base and package volume in an area increases. To this end, the Operating Agreement requires all contractors to permit FedEx Home personnel to ride with them from time to time to gather data to evaluate their service areas.

The Operating Agreement permits FedEx Home, with five working days' written notice, to reconfigure any contractor's primary service area to take account of customer service requirements. During this notice period, the contractors may try to demonstrate their ability to provide the level of service called for in the Operating Agreement. If FedEx Home determines that they are unable to do so, FedEx Home may, in its sole discretion, reconfigure the area. In the event a route reconfiguration results in contractors gaining or losing delivery work, the Operating Agreement provides for a formula under which money goes from the contractor who gained the work to the contractor who lost the work. Jewel Drive manager Donald Clark testified, however, that he has never changed a contractor's work area involuntarily.

Driver release audits and customer service rides

Contractors will be absolved from liability for loss of packages only if they comply with FedEx Home's Driver Release Program, which is part of the Operating Agreement.[29] The Operating Agreement permits FedEx Home to conduct driver release audits four times per year. In a driver release audit, FedEx managers visit customer locations after the delivery has been made to verify that the contractor complied with the Driver Release Program, e.g., by leaving packages outside of public view, in a protective plastic bag, with a delivery notice.

In addition to driver release audits, FedEx conducts two customer service rides per year with every contractor. On a customer service ride, a manager rides along all day with the contractors for the purpose of building relationship with the contractors, obtaining their input regarding their route, and ensuring that they use safe driving methods. Michael Melnyk, a former pickup and delivery manager at both Wilmington terminals, testified that he sometimes changed drivers' routes as a result, by moving an area from one route to another. A contractor may ask to reschedule the day proposed for a customer service ride.[30]

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[29] "Driver release" refers to delivering a package when nobody is home. Drivers must leave such packages out of public sight, in places not susceptible to weather damage (or the package must be wrapped in a weatherproof bag), and in places inaccessible to animals. Packages may be left only at residential dwellings with single family entrances. Drivers will be liable for the loss if they fail to obtain a required signature, release packages to a business or apartment or residence with public access or common entryways, or release a package to the wrong address.

[30] According to the Region 4 Decision, customer service rides are required if a customer complains about a contractor, but are also conducted without such a complaint having been made. The supervisor spends an entire day riding with the contractor and records the amount of time spent at each stop to determine whether the contractor has an appropriate workload. The supervisor then completes an evaluation form rating contractor performance in areas such as package delivery, safe driving, professional appearance, and customer courtesy. Supervisors speak to contractors whose performance is viewed as deficient and may memorialize the discussions in "business discussion" notes, which FedEx Home may rely on in deciding whether to terminate a contractor for non-performance. No business discussion notes were submitted into evidence in this case.

The Contractors' Daily Routine

Tractor trailers from Hartford, Connecticut deliver packages to both Wilmington terminals each day in the early morning hours. A computerized system designates which route each package belongs to. The package handlers at each terminal scan the packages with a scanner and put them on pallets at distinct places on the dock for each route. The contractors load the packages into their vehicles in the order they see fit and leave to make their deliveries. Jewel Drive contractor Paul Tremblay testified that on rare occasions, there are too many packages to fit in his van, in which case he decides which ones to leave behind and tells his terminal manager that he will deliver them the next day. Each day, FedEx Home gives the contractors a "manifest" that provides an order of stops and turn-by-turn directions to each stop on the route, but contractors are free to disregard it and deliver their packages in a different order or by a different route of their choosing, which many of them do.

All contractors must provide service on their routes Tuesday through Saturday.[31] The contractors each determine what time to start their work day.[32] They may and do take breaks during the day as they wish, to run personal errands, without permission. Contractors finish their day at all different times, although Jewel Drive Senior Manager Clark testified that FedEx Home does not want packages delivered after 8 p.m. According to the prior decisions, contractors do not punch a time clock, but they are all

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[31] As further described below, contractors may choose to make the deliveries themselves or arrange for another driver to make the deliveries if they prefer not to work on a given day. Although contractors ordinarily make their deliveries Tuesday through Saturday, they occasionally deliver packages on Sunday or Monday, for example, if they are unable to complete their route on Saturday due to poor weather or a vehicle break-down.

[32] Those at the Ballardvale terminal arrive between 6 a.m. and 9 a.m.

required to scan their FedEx Home-issued badges before they load and when they go off duty, in order to calculate their hours on the road. Contractors at the Jewel Drive facility do not return to the terminal when they have completed their routes, and most of the Ballardvale contractors go directly home after their last stop.

Customers contact FedEx Home rather than contractors to arrange deliveries. Contractors do not set the prices to be charged for deliveries or determine when and where delivery will be made. Customer complaints about deliveries are usually directed to FedEx Home and investigated by terminal management at the particular terminal involved. Contractors are not responsible for soliciting customers, although they may try to maintain good customer relations to encourage business.[33]

Flexing

In addition to permanent route reconfigurations, there are daily adjustments to the number of packages delivered by each contractor, sometimes referred to as "flexing." Flexing initiated by terminal managers generally involves packages to be delivered to towns not included in any contractor's primary service area.[34] A terminal manager may

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[33] In this regard, Jewel Drive contractor Paul Tremblay testified that he sometimes gives his business card to customers and tells customers to call or e-mail him directly rather than FedEx customer service if they have a question about a package. He has also asked the retailer L.L. Bean to ship him some catalogs to distribute to his customers to generate more L.L. Bean deliveries.

[34] As for flexing away packages to be delivered in a contractor's primary service area, the Agreement states in the section on "Agreed Standard of Service" that on any day where the volume of packages in a contractor's primary service area exceeds the volume that a contractor can reasonably be expected to handle, FedEx Home may reassign a portion of such packages to another contractor. Notwithstanding this language, Edmonds testified that contractors must consent to the removal of packages from their proprietary area under most circumstances and that, before flexing away packages, a terminal manager will give contractors an opportunity to explain how they will be able to complete all of the deliveries, e.g., through use of a supplemental vehicle or a helper.

redistribute packages from one route to another to ensure that no driver exceeds the maximum hours of driving time permitted by DOT. When a contractor calls to say he is sick or cannot work and has no contingency plan, their terminal managers sometimes disperse the packages among surrounding contractors if they are willing to handle those deliveries.[35] Flexing is generally voluntary, although Senior Manager Clark testified that there have been occasions when the Jewel Drive terminal did involuntary flexes, if one contractor had too many stops and a nearby contractor had capacity for more.[36] A contractor who delivers a package for another contractor receives the settlement for the delivery.

In addition to flexing initiated by terminal managers, contractors informally flex packages with other contractors serving adjacent areas, for which they do not need FedEx Home's permission. Various witnesses mentioned about 15 contractors at the two Wilmington terminals who flex packages with other contractors. Some do this daily and some on a regular basis, while others do so rarely.[37]

Compensation

All contractors are paid by means of a weekly "settlement" check that includes several components set forth in Addendum 3 of the June 2006 Operating Agreement. The nationwide delivery and pickup settlement includes payments of $1.29 per stop and

[35] Alternatively, the terminal manager may have a temp driver, another contractor, or a manager cover the route.

[36] Clark also testified that terminal managers cannot flex packages away from contractors' proprietary zip codes without their consent. It appears, therefore, that the type of involuntary flexing he described would occur as to deliveries to be made outside of proprietary zip codes.

[37] Jewel Drive contractor James Downs testified that he has flexed only one or two packages in the last six years.

22 cents per package and a premium for oversize packages. All contractors are paid an additional $6.50 per stop for deliveries by appointment, $2.75 for evening deliveries, and 50 cents per stop for packages that require a customer's signature. All contractors are paid a daily mileage settlement of 20 cents per mile for miles driven between 201 and 400 miles daily, based on the mileage set forth in their daily manifest (as opposed to the actual miles driven). They receive a per-package fee for sorting and loading packages into their vehicle. In the event of substantial increases in fuel prices, the contractors receive a fuel/mileage settlement of up to 10 cents per mile, depending on fuel prices within a five-mile radius of their terminal. They are paid $15 to $30 for each day that the number of stops they complete exceeds a certain threshold.

All contractors are paid a van/vehicle availability settlement for each business day that they make a vehicle and a qualified driver available and provide services under the Operating Agreement. Under the current Agreement, the settlement ranges from $25 to $35 per day, depending on the type and age of the vehicle. A holiday van availability bonus of $50 is paid for making a vehicle available on both the work day before and the work day after six specified holidays.

All contractors receive a temporary core zone density settlement payment in consideration of their agreeing to provide service to an area when the customer density and package volume in the service area is still developing. FedEx Home may reduce or eliminate the temporary core zone density settlement as density and/or package volume increases. According to Addendum 3 of the June 2006 Operating Agreement, the core zone density settlement currently ranges from $27 to $127 per day. In the Worcester case, Edmonds testified that a contractor may negotiate with a terminal manager for an

increased core zone density payment, and that FedEx Home will do a customer service ride with the contractor to evaluate the appropriateness of an increase. Former Wilmington pickup and delivery manager Melnyk testified that one former Jewel Drive contractor, Loay El Dagany, once requested some customer service rides to gauge if his core zone payment was set properly, and the payment was raised as a result, although Melnyk was not sure by how much. There is no evidence that any other contractors at the Wilmington facilities have negotiated a change in their core zone payment.

No settlement sheets from the Jewel Drive or Ballardvale terminals were introduced into evidence, but Clark testified that the core zone and van availability payments constitute around 30 to 40 percent of the total payment to Jewel Drive contractors. Busby testified that core zone and van availability pay together constitute about 30 percent of take-home pay at Ballardvale.

All contractors receive a service bonus ranging from $150 to $625 for each completed fiscal quarter, depending on their number of years as a FedEx Home contractor. All contractors are eligible for an individual safety and customer service bonus of $120 per accounting period if they have no at-fault accidents, have no verified customer complaints, and meet certain goals for daily scanner up-load compliance and accuracy. All contractors are eligible for a group performance-related bonus ranging from $10 to $30 per contractor per period, if the terminal in which they work meets a group "inbound service" goal for the period. All contractors receive a bonus of $50 per month if they do not fail a driver release audit and receive no driver release complaints.

FedEx Home does not provide the contractors with any fringe benefits and does not withhold taxes from their pay. FedEx Home gives all contractors an Internal Revenue Service "1099" form at the end of each year.[38]

According to an exhibit submitted by FedEx Home, three of the contractors at the two Wilmington terminals, each of whom was a multi-route contractor, grossed over $150,000 in 2005.[39] Twenty-one Wilmington contractors grossed between $60,000 and $90,000 in 2005, eight grossed between $30,000 and $60,000, two grossed between $20,000 and $40,000, and six grossed between $3500 and $20,000.[40] The record does not reveal their net income after expenses.

Business Support Package

FedEx Home offers to sell all contractors a Business Support Package that provides them with certain necessary items they are required to have in order to work as FedEx Home contractors. Thus, all contractors are required to have scanners. As indicated above, the scanners record the location and delivery of each package during its journey. The information from the scanners is uploaded periodically and transmitted to a nationwide customer service data base so that customers can track the status of their packages. The scanners are also used to meet a regulatory requirement that carriers must

[38] At the hearing in the Worcester case, FedEx Home sought to introduce into evidence two documents from the Internal Revenue Service, referred to as a "letter of assurance," evidencing that agency's 1995 determination, based on the 1994 Operating Agreement, that Roadway Package System's contractors were independent contractors for purposes of the Internal Revenue Code. The Board previously considered the IRS letter of assurance in *Roadway Package Systems*, 326 NLRB 842, 854 fn. 46 (1998), and found it not to be dispositive. Accordingly, I found that the hearing officer in the Worcester case had properly rejected this exhibit.

[39] These were Cecil Hyre, Wayne Curran, and Timothy Jung.

[40] The record does not reveal whether all of these contractors worked a full year at these terminals in 2005.

know where their shipments are and a regulatory requirement to log the number of hours that contractors have driven.

In addition, the Operating Agreement requires all contractors to wear a FedEx Home uniform, maintained in good condition, and to keep their personal appearance consistent with standards promulgated by FedEx Home from time to time. They are required to wear an identification badge with the FedEx Home logo, a photo, and the word "contractor."[41]

Accordingly, although not required to, contractors may opt to purchase FedEx Home's Business Support Package to obtain items FedEx Home requires. The package includes company decals for the vehicles, standard uniforms, random drug tests meeting DOT requirements, contractor assistance programs,[42] an annual DOT vehicle inspection, lease of a scanner and communications and related equipment, a vehicle washing service necessary to comply with both government regulations pertaining to waste water run-off and with contractual appearance standards, and mapping software. The package cost of $4.25 per day per van, and an additional $2.00 per day for scanners used by the contractors' helpers and supplemental drivers, is deducted from the contractors' settlements.

Edmonds testified in the Worcester case that contractors may choose to purchase their uniforms directly from the vendor and that some contractors at other locations do so. He also testified that contractors may choose to purchase scanners directly from the manufacturer and that, from time to time, he has put together a list of vendors from which

[41] According to the Region 4 Decision, DOT regulations require FedEx Home to have its drivers carry identification.

[42] The record does not reveal what the contractor assistance programs are.

contractors may purchase them. The record does not reveal how many of the contractors at the Jewel Drive and Ballardvale terminals have opted to purchase the Business Support Package.

About three to four years ago, a camera company offered to make a "backing" camera available to all FedEx Home contractors, nationwide, for a low price. Purchasing the camera was optional, and the cost of about $185 was deducted from the settlement checks of those contactors who chose to purchase one.

Incorporation

All contractors have the option of incorporating as a business, in which case their settlement is remitted to the corporation. In the Worcester case, Edmonds testified that, nationwide, 15 to 20 percent of FedEx Home contractors have incorporated. According to the Employer's proffer in this case, he would now testify that 872 out of 3826 contractors are incorporated nationwide, which I calculate as 23 percent. At Jewel Drive, three of the twenty-two current contractors, Wayne Curran, Robert Fonseca, and Ricardo Gely, have incorporated, and three former contractors were also incorporated.[43] At the Ballardvale terminal, two of the sixteen contractors, Wayne Curran and Se-Hoon Oh, have incorporated.[44]

Insurance

According to the Region 4 Decision, DOT regulations specify that carriers such as FedEx Home must be primarily responsible for injuries or damage caused by leased vehicles and must purchase insurance to cover the costs of such injuries or damage. The

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[43] These were Alan Douglass, Diane Desantis, and Juan Valasquez.

[44] Curran has routes at both Wilmington terminals.

carrier may, however, seek indemnification for any liability from the owner of the vehicle. Consistent with the regulations, the Operating Agreement requires FedEx Home to maintain public liability insurance for vehicular personal injuries, property damage, cargo loss, or damage resulting from the contractor's operation of equipment in connection with FedEx Home's business. FedEx Home also agrees to indemnify all contractors against liability for damages resulting from the operation of the equipment while on FedEx Home business, with certain exceptions. Contractor indemnification does not apply in the event the contractor or the operator of the vehicle engages in intentional misconduct or willfully negligent behavior. It also lapses if contractors fail to comply with FedEx Home's Safe Driving Program standards, in which case contractors are obliged by the Operating Agreement to secure their own liability insurance for damages that occur while on FedEx Home business. Regardless of who is carrying this insurance, all contractors are liable for the first $500 in damages resulting from the operation of their vehicles, although their liability is reduced to $250 after one year and eliminated after two years of operation without an at-fault accident.

The Operating Agreement requires all contractors to maintain public liability insurance in certain amounts specified by FedEx Home for damages resulting from operation of their vehicles for their personal benefit. It also requires them to maintain work accident and/or workers' compensation coverage, which is required by many states, in specified minimum amounts for both themselves and their employees. The contractor may choose whether to obtain the insurance through a policy negotiated by FedEx Home, through a policy providing comparable benefits, or through an applicable state-sponsored workers' compensation program.

FedEx Home has a relationship with a company called Protective Insurance that will provide all contractors, nationwide, with any required insurance, and FedEx Home will deduct the premiums from the contractors' settlements. In addition to work accident insurance, Protective offers all contractors optional "deadhead/bobtail" insurance that provides certain coverage when contractors use their vehicles for personal purposes. Edmonds testified that contractors need not use this company, but that Protective's rates are significantly lower than rates contractors can get on their own. Edmonds testified that it does happen that contractors obtain insurance coverage elsewhere, but some contractors who have investigated doing so realized it makes no sense due to the Protective Insurance discount. The record does not reveal the degree to which the contractors at the Wilmington terminals obtain their insurance through FedEx Home or elsewhere.

Time Off Program and Swing Contractors[45]

Contractors who wish to take a vacation are responsible for finding a qualified substitute driver to cover their route. Some of them, as further described below, pay another contractor or driver or one of the "terminal temp" drivers from Kelly Services to cover their route. In the alternative, contractors may choose to participate in the Time Off Program, under which FedEx Home will provide a qualified driver to cover their route for a week at a time. Participating contractors must remain in the program for the entire year. Participants pay $17.50 per week for a year for two weeks of time off, the cost of which is deducted from their settlement as part of their Business Support Package. Participants may purchase additional weeks off for an additional $1.75 per day.

[45] The Time Off Program is described in Attachment 6.1 to Addendum 6 of the Operating Agreement.

Selections of time off weeks are made in May of each year, with selections made according to length of time as a contractor.

FedEx Home uses "swing" contractors to cover for the contractors who participate in the Time Off Program. Swing contractors receive a settlement from FedEx Home for the deliveries they make in covering the route.[46] According to the decision in the Worcester case,[47] swing contractors receive a premium per stop over the usual rate and a premium over the standard van availability rate, and they are also paid for participating in a "familiarization ride" with the contractor for whom they are covering. In the event that a swing contractor is covering for a route where the contractor uses a P350 vehicle, FedEx Home may provide the vehicle and pay the rental charges in lieu of paying the van availability premium to the swing contractor.

One full-time swing contractor, Clayton Schwann, and one part-time swing contractor, Cecil Hyre, are the designated swing contractors for both the Jewel Drive and Ballardvale terminals.[48] Thirteen of the sixteen Ballardvale contractors participate in the Time Off Program. The record does not reveal how many of the Jewel Drive contractors participate.

Multiple Route Drivers

[46] The contractor whose route the swing contractor covers does not receive a settlement for the work.

[47] The record in the current case does not include updated evidence concerning the payment of swing contractors.

[48] Schwann has no routes other than his swing routes and currently covers 42 weeks of swing routes per year. Hyre is a contractor for three routes at the Jewel Drive terminal in addition to being a part-time swing contractor for both terminals.

Some FedEx Home contractors have Operating Agreements covering more than one route. This requires them to hire one or more drivers to operate their additional routes on a regular basis. Drivers hired by contractors must be pre-approved by FedEx Home. In this regard, according to the Operating Agreement, such drivers must be qualified pursuant to government standards and FedEx Home Safe Driving Program standards. This means that such drivers must have a valid DOT card, which requires passing a physical and a drug test, and they must also have clean driving and criminal records. Drivers hired by contractors must meet the same driver training requirement required of contractors. The drivers hired by contractors wear the FedEx Home uniform, use the same scanners, and must fulfill the same obligations required of the contractors.[49]

The multiple route contractors have sole authority to hire and dismiss their drivers and to otherwise determine their tenure of employment. The contractors are responsible for paying their drivers' wages and are responsible for all expenses associated with hiring drivers, such as the cost of training, physical exams, drug screening, employment taxes, and work accident insurance. The amount of the drivers' pay and benefits, and matters such as who is responsible for fuel costs, are matters for negotiation between the contractors and their drivers. If a terminal manager has an issue regarding a delivery by a contractor's driver, he or she takes it up with the contractor rather than with the driver. The contractors set the work hours for their drivers and approve their time off.

[49] The Operating Agreement's provision concerning "Employment of Qualified Persons" states that "Contractor understands and agrees that such persons shall not be considered employees of FHD and that it is the Contractor's responsibility to assure that such persons conform fully to the applicable obligations undertaken by the Contractor pursuant to this Agreement."

There are currently three multiple route contractors at the two Wilmington facilities.[50] Contractor Ricardo Gely operates two routes out of Jewel Drive. He drives one route himself and has hired driver George Mbalire to drive the other one on a full-time basis. Contractor Wayne Curran operates two routes out of the Ballardvale terminal. He drives one himself, and his wife, Kathy Curran, drives the other route. Finally, contractor Cecil Hyre operates two routes out of Jewel Drive and one route out of Ballardvale, and he also serves as a part-time swing contractor for both facilities. When Hyre is driving his swing route or covering for other contractors who need a random day off, he needs three drivers for his other routes. When he is not doing swing work himself, he moves around between his own three routes. He employs five different drivers to assist him with his three routes.[51]

In addition to the three current multiple route contractors, four former contractors at Jewel Drive operated multiple routes. Former contractor Juan Valasquez had two routes, Diane Desantis had two to three routes, Timothy Jung had two routes, and Alan Douglass had four to five routes. They hired drivers to operate some or all of their routes at various times.

Contractors Hiring Drivers and Helpers

In addition to multiple route contractors who employ drivers on an ongoing basis, both multiple route and single route contractors may hire drivers on a temporary basis from time to time. As noted above, contractors who are ill or who wish to take a vacation

[50] Becuase the three multiple route contractors operate between them seven of the 40 routes at the two Wilmington terminals, it appears that there are about 33 single route contractors at the two terminals.

[51] Hyre's drivers are Leon Campbell, Damian Jean Baptiste, Angela Allen, Sherry Spence, and Hyre's wife, Kelly Marson-Hyre.

or other time off apart from the Time Off Program may hire and pay a driver to replace themselves, and several have done so on occasion.[52] It appears that many contractors who hire substitute drivers use the FedEx Home "temp" drivers or other contractors, who are already trained and otherwise qualified. As is the case with multiple route contractors who hire drivers, FedEx Home is not involved in a contractor's decision to hire or terminate a substitute driver, and contractors do not even have to tell FedEx Home that they have hired a replacement driver, so long as the driver is "qualified." Contractors who occasionally hire a substitute are similarly responsible for determining their pay and hours, and the substitute drivers must fulfill all the obligations that the contractors have to FedEx Home.

If the volume of deliveries on a contractor's route is beyond the capacity of a single vehicle, the contractor may choose to rent a second vehicle for the route, referred to as a "supplemental" vehicle, and hire an additional driver to operate it. Contractors use supplemental vehicles and drivers primarily during the busy Christmas season, although they can use them at other times as well. Drivers of supplemental vehicles must also meet the DOT requirements. Melnyk testified about four contractors who have hired supplemental drivers at Jewel Drive. The record does not reveal whether any contractors at Ballardvale have ever hired supplemental drivers.[53]

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[52] For example, several contractors have hired driver Paul Morgan when they want a day off. One hired him to cover for a week-long vacation, and another hired him to cover his route for two to three weeks due to illness.

[53] Ballardvale Pickup and Delivery Manager Busby testified that no Ballardvale contractors have run supplementals in his time there, but he has been there only since March 2006.

Contractors may also choose to hire helpers.[54] A helper rides in the vehicle with the contractor, retrieves packages from the vehicle, and delivers them to residences. Since helpers do not drive, they do not need to be DOT-qualified, although Melnyk testified that FedEx Home does a criminal background check on helpers for security reasons. Contractors do not need to notify FedEx Home that they are using a helper, and FedEx Home is not involved in the financial arrangements between contractors and helpers. Melnyk testified that contractors Leandro Baez,[55] Jorge Ascensio, and Cecil Hyre at Jewel Drive have employed helpers, and contractors Robson Araujo and Loay El Dagany at Ballardvale have employed helpers. Contractor Jose Aguilar used a helper both when he work at Jewel Drive and after he moved to Ballardvale. As for the frequency with which contractors hire helpers, Melnyk testified that Hyre used a helper from time to time, but the record does not reveal how often the other contractors have used helpers.

Route Sales

The Operating Agreement gives all contractors the ability to assign their contractual rights to a replacement contractor, provided that the new contractor has the necessary driving qualifications and is willing to enter into an Operating Agreement with FedEx Home on "substantially the same terms and conditions" as the original contractor. Managing Director of Contractor Relations Edmonds testified that contractors do not need FedEx Home's permission to sell their routes, but they must notify FedEx Home so

[54] It appears that neither party seeks to include in the unit any of the helpers hired by the contractors.

[55] It appears from the lists of contractors that Baez is no longer employed at either facility.

that the buyer may sign a new Operating Agreement.[56] The amount of any consideration paid is strictly between the seller and the buyer, but FedEx Home may agree, as an accommodation, to collect the consideration from the replacement contractor by deducting it from his or her weekly settlement and remitting it to the seller.

Edmonds testified that there are some zip codes and/or geographic areas within the U.S. that are not "owned" by any FedEx Home contractor. It appears that when FedEx Home determines to create a new route in such areas, it gives those new routes to contractors for free.[57] Edmonds testified that if a contractor simply terminates his Operating Agreement without selling his route, the abandoned route becomes an open area, which FedEx Home would give to a new contractor for free.

At the Region 4 hearing, FedEx Home provided an expert witness to testify about the marketability of routes. He testified that, in his view, contractors have characteristics of small businessmen because they make capital investments, have the opportunity to expand, can profit from hiring employees, and can generate profits or losses based on managerial skill. He also testified that there is significant variation between the routes as to how much the contractors can earn. He testified that the ability of contractors to

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[56] According to Edmonds, a new Operating Agreement would not be required if an incorporated contractor sells his corporation to someone else. In such cases, the original Operating Agreement, which was made with the corporation, continues to apply to the corporation's new owner.

[57] Some Wilmington contractors testified that they did not pay FedEx Home for their routes, and Edmonds testified that FedEx Home does not get involved in "the equity market." He testified that in the case of FedEx Ground, which is a more mature business than FedEx Home, all zip codes are proprietary and, with rare exceptions, no areas are unspoken for. FedEx Home, in contrast, still services areas not owned by any contractor. As noted above, contractors may "own" a proprietary zip code that is defined in their Operating Agreement and, in addition, service an outlying area that is not part of their proprietary area. When the contractor sells his route, the areas beyond the proprietary area typically go along with it, but they do not become proprietary at the time of sale.

transfer their rights should make their routes marketable, but conceded that route value might decline if FedEx Home added new routes or existing routes were routinely available.

There is no record evidence of any route sales at the Ballardvale facility. With respect to sales of routes at the Jewel Drive facility, former contractor Brian Neal[58] testified that he sold his route and truck to contractor Clayton Schwann in early 2005. Neal did not pay for his route when he became a contractor at Jewel Drive in 2003, but he paid about $28,000 for his truck in 2003, and testified that the market value of his truck at the time of the sale in early 2005 was $12,000 to $15,000. He sold the route and truck to Schwann for $18,000, of which $1000 went to a broker who handled the transaction.[59]

Timothy Jung, a former contractor at Jewel Drive,[60] disposed of his two Jewel Drive routes in March 2006. Jung testified that he did not pay for his Gloucester/Manchester/Rockport route when he acquired it, but he paid $34,000 or $35,000 for the truck he used to service it, and the "Bluebook" value of the truck when he sold it along with the route was about $20,000 to $25,000. Jung sold the truck and route to Aquinaldo Ferreira for $10,000 cash, and Ferreira also took over Jung's payments on the truck, on which Jung then owed about $26,000. As for Jung's second Jewel Drive route covering Topsfield, Hamilton, Ipswich, and Essex, Jung sold the truck he had used

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[58] Neal is currently the Regional Quality Service Manager for FedEx Home in New England.

[59] Neal testified that the transaction was memorialized by a bill of sale for the truck and an addendum listing the zip code of his route as part of the package. The hearing officer asked Neal to produce the bill of sale, and he stated that he would try to get it, but the bill of sale was never introduced into evidence.

[60] Jung is currently a Regional Quality Service Manager for FedEx Home.

to service this route to another contractor, who used the truck for a different route and did not take over Jung's route. It appears that Jung abandoned this route without selling it.

Jewel Drive contractor Diane Desantis abandoned her two routes without selling them, apparently sometime in 2004. Melnyk, who was the pickup and delivery manager at Jewel Drive in 2004, testified that Desantis took her vehicles with her and that there was no exchange of money between her and the new contractor who took over her routes. Jewel Drive contractor Paul Tremblay testified that he did not pay for his route, although he hopes to sell it when he retires.

Finally, a contractor named Juan Valasquez, who incorporated as Velpo Delivery Company, had two routes at the Jewel Drive facility, and hired Richard Gely and Armani Kuame to drive them. Valasquez left the country and, about February 2006, he told Gely that he was unable to return due to immigration problems. Gely accepted Valasquez's offer to take over the lease on his truck and the route. Gely signed a new Operating Agreement for the route, but there is no evidence that he paid Valasquez any money for it. Jewel Drive Manager Donald Clark testified that Kuame bought Valasquez's truck and signed a new Operating Agreement for Valasquez's other route in May 2006. Kuame paid Valasquez around $30,000 for his 2004 truck, which costs around $32,000 to $35,000 new, but Clark did not know the specifics of their agreement and did not know if that figure was for the value of the vehicle alone or for the value of the vehicle and route together.

**ANALYSIS OF INDEPENDENT CONTRACTOR STATUS**

Section 2(3) of the Act provides that the term "employee" shall not include "any individual having the status of independent contractor." In determining whether an

individual is an employee or an independent contractor, the Board applies the common law agency test and considers all the incidents of the individual's relationship with the employing entity. The determination of whether or not an individual is an independent contractor is quite fact-intensive. The burden is on the party asserting independent contractor status to show that the classifications in question are independent contractors. *Argix Direct, Inc.*[61] and cases cited there.

On three occasions prior to FedEx's acquisition of Roadway in 1998, the Board considered whether contractor drivers employed by Roadway were independent contractors or employees within the meaning of the Act. In each case, the Board found that the drivers were employees. *Roadway Package Systems* (*Roadway I*);[62] *Roadway Package Systems* (*Roadway II*);[63] *Roadway Package Systems* (*Roadway III*).[64] As noted above, on three occasions since FedEx's acquisition of Roadway, two involving FedEx Home terminals and one involving a FedEx Ground terminal, the Board has affirmed Regional Directors' determinations that contractors employed by FedEx were statutory

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[61] 343 NLRB No. 108, slip op. at 4 (December 16, 2004). The multifactor analysis set forth in *Restatement (Second) of Agency , Sec. 220*, includes the following factors to be examined: 1) the control that the employing entity exercises over the details of the work; 2) whether the individual is engaged in a distinct occupation or work; 3) the kind of occupation, including whether, in the locality in question, the work is usually done under the employer's direction or by a specialist without supervision; 4) the skill required in the particular occupation; 5) whether the employer or the individual supplies the instrumentalities, tools, and the place of work for the person doing the work; 6) the length of time the individual is employed; 7) the method of payment, whether by the time or by the job; 8) whether the work in question is part of the employer's regular business; 9) whether the parties believe they are creating an employment relationship; and 10) whether the principal is in the business. *Id.* at fn. 13.

[62] 288 NLRB 196 (1988).

[63] 292 NLRB 376 (1989), enfd. 902 F.2d 34 (6th Cir. 1990).

[64] 326 NLRB 842 (1998).

employees.[65] The facts adduced in this case are remarkably similar to those in the above cases and, accordingly, do not warrant a departure from the results in those cases.

In finding drivers to be employees in *Roadway III*, the Board relied, *inter alia,* on several factors also present in this case. As in *Roadway III*, all the FedEx Home contractors perform a function that is a regular and essential part of FedEx Home's normal operations, the delivery of packages. Although they have the option to incorporate as a business,[66] all contractors must do business in the name of FedEx Home. In this regard, wearing FedEx Home-approved uniforms and badges, all contractors operate vehicles that must meet FedEx Home specifications and uniformly display the FedEx Home name, logo, and colors. As noted in the Region 4 Decision, while the logos, uniforms, and badges are to some extent designed to comply with DOT regulations, they are also an important component of FedEx Home's nationwide effort to

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[65] FedEx Home asserts, as it did in the Worcester case, that it is error to rely on the Paterson, New Jersey case, which involved a FedEx Ground operation rather than a FedEx Home operation. For the reasons noted in the Worcester decision at fn. 58, I find that the differences cited by FedEx Home between the two types of operations are not material to a determination of independent contractor status. More important, in both the Worcester case and in this case, I noted that I have relied primarily on prior Board-reviewed cases involving FedEx Home operations, first Barrington and now Worcester. Even discounting any reliance on the Paterson FedEx Ground case, and relying exclusively on the FedEx Home cases, I find that the result would be the same.

FedEx continues to assert in this case that I should rely on an August 3, 2000 DD&E, in which the Regional Director for Region 5 found that drivers employed by FedEx's predecessor at a Maryland ground facility were independent contractors. As I noted in the Worcester decision, there was no request for review of that decision. Since unreviewed regional directors' decisions have no precedential value, I again decline to rely on the Region 5 Decision. *The Boeing Company*, 337 NLRB 152, 153 fn. 4 (2001).

[66] In *Roadway III*, the Board found employee status, notwithstanding the fact that a few drivers operated as incorporated businesses. I note that only four of the current contractors at the two Wilmington terminals have incorporated as a business. Moreover, two of those Wilmington contractors, Wayne Curran and Ricardo Gely, are multiple route contractors, who, for reasons described below, I have excluded from the unit. The three former Jewel Drive contractors who were incorporated were also multiple route contractors. Thus, only two of the 33 single route contractors in the unit, Robert Fonseca and Se-Hoon Oh, have incorporated as a business.

market its brand name, and the logos are larger than required by DOT regulations.[67] No prior delivery training or experience is required, and FedEx Home will train those with no experience. "Thus the drivers' connection to and integration in [the Company's] operations is highly visible and well publicized." *Roadway III*.[68]

As in *Roadway III* and the prior FedEx Home cases, contractors are not permitted to use their vehicles for other purposes while providing service for FedEx Home. The contractors have a contractual right to use their FedEx Home trucks in business activity outside their relationship with FedEx Home during off-hours, provided they remove all FedEx Home markings, but only one former multiple route contractor at Jewel Drive and no current contractors at either Wilmington terminal have ever done so. I find, as did the Board in *Roadway III*, that "[t]his lack of pursuit of outside business activity appears to be less a reflection of entrepreneurial choice by the …drivers and more a matter of the obstacles created by their relationship with [the Company.]" Thus, the contractors' contractual right to engage in outside business falls within the category of "entrepreneurial opportunities that they cannot realistically take," because the

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[67] FedEx Home argues that, under current Board law, an employer's conformance to government-imposed regulations does not establish employer control and, therefore, cannot constitute a factor favoring a finding of employee status. *Don Bass Trucking, Inc.*, 275 NLRB 1172 (1985), quoting *Air Transit, Inc.*, 271 NLRB 1108 (1984); *Diamond L. Transportation*, 310 NLRB 630 (1993). In his concurrence in *Roadway III*, Member Gould asserted that he would reverse this precedent, while the majority found it unnecessary to reach the issue because its disposition of the case was not based on factors stemming from governmental regulation or control. 326 NLRB at 848, fn. 28 and 854-855.

[68] 326 NLRB at 851.

contractors' work schedules prevent them from taking on additional business during their off-hours during the workweek. *Roadway III*.[69]

As in *Roadway III* and the prior FedEx Home cases, Fed Ex Home exercises substantial control over all the contractors' performance of their functions. FedEx Home offers what is essentially a take-it-or-leave-it agreement. While all contractors may negotiate with their terminal manager over what towns will be included in their primary service area, FedEx Home retains the right to reconfigure the service area unilaterally. All contractors must furnish a FedEx Home-approved vehicle and FedEx Home-approved driver daily from Tuesday through Saturday; they do not have the discretion not to provide delivery service on a given day. While all contractors control their starting times and take breaks when they wish, their control over their work schedule is circumscribed by the requirement that all packages be delivered on the day of assignment. FedEx Home requires all contractors to scan all packages at the start of the workday and before delivery. While use of the scanners allows the contractors to comply with DOT regulations requiring that drivers log their hours, it also allows FedEx Home to provide its customers with a package tracking service. FedEx Home also requires all contractors to deliver packages to empty residences in the manner prescribed by the Driver Release Program guidelines. All contractors must follow FedEx Home's guidelines for safe driving. FedEx Home gives bonuses tied to compliance with its guidelines, giving it a further measure of control over contractor performance. The Operating Agreement

[69] 326 NLRB at 851 and fn. 36. The Board noted in *Roadway III* that the drivers were hindered from using their vehicles for other purposes during off-work hours, in part because they had to return their vehicles to the terminal each night for loading of the next day's packages. In the prior FedEx Home cases, as here, the contractors were not required to return their vehicles to the terminal each night, yet the Board still denied review of the finding of employee status.

requires all contractors to buy insurance in types and amounts specified by FedEx Home, including even insurance for damages contractors may incur while operating their vehicles for their personal benefit.

As in *Roadway III* and the prior FedEx Home cases, FedEx Home provides support to all its contractors in various ways that are inconsistent with independent contractor status. FedEx Home refers contractors to dealers from which they may lease or purchase the FedEx Home-approved vehicles and to lenders willing to finance such purchases. It refers contractors to other contractors who may wish to sell their used FedEx Home vehicles, thus "easing a new driver's responsibility for obtaining a qualified vehicle" and "increasing the likelihood that there will be a qualified buyer for a costly specialty vehicle no longer needed" by a contractor. *Roadway III*.[70] FedEx Home provides extensive support to contractors by offering the Business Support Package and arranging for the required insurance, thus providing an array of required goods and services that would be far more difficult for contractors to arrange on their own. As in *Roadway III* and the prior FedEx Home cases, contractors are certainly free to purchase these required goods and services elsewhere, but there is no evidence that any Wilmington contractor has purchased these items elsewhere, suggesting that the right is not meaningful. FedEx Home also offers to arrange for approved substitute drivers for its contractors by virtue of the Time Off Program.[71] FedEx Home provides contractors who maintain sufficient vehicle maintenance accounts with $100 per accounting period to help defray repair costs. FedEx Home requires contractors to permit FedEx Home to pay

[70] 326 NLRB at 852.

[71] The Time Off Program appears to be a new means by which FedEx Home supports its contractor workforce that did not exist in either *Roadway III* or the Region 4 case.

certain vehicle-related taxes and fees on their behalf and to have the payments deducted from their settlement.

The contractors' compensation package also supports employee status. With the exception of the right to appeal changes in core zone density payments,[72] FedEx Home unilaterally establishes the rates of compensation for all contractors. As in *Roadway III*, there is little room for the contractors to influence their income through their own efforts or ingenuity, as their terminal manager determines, for the most part, how many deliveries they will make each day; there is no evidence that a refusal or willingness to deliver "flexed" packages has significantly altered any contractor's income. A contractor's territory may be unilaterally reconfigured by FedEx Home. FedEx Home tries to insulate its contractors from loss to some degree by means of the vehicle availability payment, which they receive just for showing up, and the temporary core zone density payment, both of which payments guarantee contractors an income level predetermined by FedEx Home, irrespective of the contractors' personal initiative. FedEx Home also shields drivers from loss due to substantial increases in fuel prices by means of the fuel/mileage settlement.

As in *Roadway III* and the prior FedEx Home cases, the contractors at the Wilmington terminals have the contractual right to sell their routes, but the contractors may sell only to buyers who are acceptable to FedEx Home as qualified and who are willing to enter into an agreement with FedEx Home on substantially the same terms. In *Roadway III*, the Board found that evidence of a few such sales, some of which were

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[72] There is evidence of only one contractor at the two Wilmington terminals who has ever negotiated an increase in his core zone density payment.

forced by Roadway, were insufficient to support a finding of independent contractor status, particularly since it was unclear from the record whether any driver had profited materially from a sale.

Here, there is no evidence that any Ballardvale contractor has ever sold a route. There have been only two route sales at Jewel Drive, but the sales were combined with the sale of a truck, which makes the portion attributable to the route murky. In one case, contractor Brian Neal sold a route for which he paid nothing, along with a truck whose value he estimated at $12,000 to $15,000, for a total of $18,000, and paid a $1000 fee to a broker. Thus, Neal's profit on the sale of his route was only $3000 to $6000. In the case of the second route sale, Aquinaldo Ferreira paid Timothy Jung $10,000 cash and agreed to take over the $26,000 debt on his truck. After deducting the value of the truck, which Jung estimated at between $20,000 to $25,000, it appears that, at best, Ferreira paid Jung somewhere between $11,000 to $16,000 for the route. There is evidence that FedEx Home gave routes to other contractors at the two Wilmington terminals for free. There is also evidence that Jung abandoned his second route without selling it, that contractor Diane Desantis abandoned two routes without selling them, and it appears that contractor Juan Valasquez abandoned his two routes without selling them, as well. In these circumstances, I find the evidence of only two route sales too insubstantial to support a finding of independent contractor status.[73]

In concluding that the contractors are statutory employees, I acknowledge the existence of several factors that support FedEx Home's contention that the contractors are independent contractors. In this regard, the Operating Agreement signed by the

[73] It may be difficult for contractors to sell their routes, because FedEx Home apparently gives new or abandoned routes to potential contractors for free.

contractors provides that they will provide services "strictly as an independent contractor, and not as an employee." The contractors own their own vehicles, which are costly, and they are responsible for maintenance, repair, and fuel costs. A few contractors own more than one vehicle. Contractors are free to put their own name on their vehicles, and they are free to use their vehicles for other commercial purposes if they remove or cover the FedEx Home logo. Contractors hire helpers and other drivers and determine their wages. Contractors determine when to start and end their day and when to take breaks, and are free to determine what route to take to each stop. Contractors receive no fringe benefits and FedEx Home does not withhold taxes from their pay. Contractors are not subject to discipline and may challenge their termination through binding arbitration. The support that FedEx Home provides by virtue of the Business Support Program and group insurance program is optional for contractors, who are free to purchase these goods and services elsewhere. Contractors have the option to sell their routes. I note, however, that all these factors were present in *Roadway III* and/or the prior FedEx Home cases and that the Board has, therefore, already determined, based on other factors that outweigh them, that they are insufficient to demonstrate independent contractor status.

The Board's decisions in *Dial-A-Mattress*[74] and *Argix Direct, Inc.*,[75] on which FedEx Home relies, are distinguishable.[76] In finding the owner-operators to be

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[74] 326 NLRB 884 (1998).

[75] Supra at 343 NLRB No. 108.

[76] I note that FedEx Home's reliance on these same cases in the prior FedEx Home cases has already been rejected by the Board in those cases. Further, the *Dial-A-Mattress* Board expressly found that case to be distinguishable from *Roadway III*, which involved the operations of FedEx Home's predecessor.

independent contractors in *Dial-A-Mattress*, the Board noted that they arranged their own training and were not required to provide delivery services each day. Dial-A-Mattress played no part in the selection, acquisition, or inspection of the owner-operators' vehicles. It had no requirement as to the type, model, color, size, or condition of the vehicles, and provided no fuel subsidy or maintenance subsidy. Each vehicle had to display the name of the owner-operators' companies, rather than Dial-A-Mattress's name. Although not required to display Dial-A-Mattress's advertising on their trucks, many owner-operators did so, in exchange for a fee. Owner-operators were not required to wear Dial-A-Mattress uniforms, and many had their own company uniforms. There was no guaranteed minimum compensation to minimize the owner-operators' risks, and there was evidence that some owner-operators had negotiated changes in delivery rates with Dial-A-Mattress.

In *Argix Direct*, unlike this case, the employer did not require that the owner-operator's trucks be of any particular make, model, or color, and required only a small DOT-required sign with Argix's name. Argix placed no restriction on the use of vehicles for other purposes, owner-operators were free to elect not to accept routes on specific days, and some curtailed their services for Argix one day a week in order to work elsewhere. The owner-operators were not assigned specific routes, and Argix did not guarantee that the owner-operators would receive work each day. The number of routes varied from day to day, so that owner-operators drove for Argix fewer than five days a week most of the year. Owner-operators received no guaranteed income. Moreover, in *Argix Direct* it was much more common for contractors to operate multiple routes, as five of the contractors owned 20 of the 63 trucks.

Accordingly, I find that the contractors are employees within the meaning of the Act and are properly included in the units found appropriate.

**STATUS OF MULTIPLE ROUTE CONTRACTORS AND DRIVERS REGULARLY EMPLOYED BY MULTIPLE ROUTE CONTRACTORS**

As noted above, there are three multiple route contractors at the two Wilmington terminals, Cecil Hyre, Wayne Curran, and Ricardo Gely, all of whom must necessarily employ other drivers to operate their routes on a regular basis. Apart from its contention that multiple route contractors, like all of the contractors, are independent contractors, FedEx Home seeks to exclude the multiple route contractors from the units on the additional ground that they are statutory supervisors. Additionally, FedEx Home seeks to exclude the drivers hired by the multiple route contractors on the ground that they are not employees of FedEx Home and, alternatively, that they lack a community of interest with the FedEx Home contractors. The Union seeks to include both the multiple route contractors and the drivers they employ in the unit.

An analysis of the status of the multiple route contractors must begin with an inquiry into the employee status of the drivers they hire on an ongoing basis.[77] I find that FedEx Home exercises sufficient control over the drivers' working conditions to warrant

[77] An individual must exercise supervisory authority over employees of the employer at issue, and not employees of another employer, in order to qualify as a statutory supervisor. *Crenulated Co.*, 308 NLRB 1216 (1992). Thus, if the drivers hired by the multiple route contractors are not employees of FedEx Home, the multiple route contractors cannot be statutory supervisors by virtue of their exercise of supervisory authority over them. For this reason, I conclude that it is necessary for me to decide the employee status of the drivers hired by multiple route contractors despite the fact that the parties took the position that they should be permitted to vote under challenge. In any event, I have concluded that these drivers should be permitted to vote under challenge.

Because no party asserts that the drivers are jointly employed by FedEx Home and the multiple route contractors, I do not reach that issue. As noted above, no party seeks to include drivers that are hired by either multiple route or single route contractors on a temporary basis, such as substitute drivers who fill in for absences or supplemental drivers.

a finding that they are employees of FedEx Home. *International Transfer of Florida, Inc.*[78] In this regard, FedEx Home establishes minimum qualifications for any drivers hired by its contractors, all of whom must pass physical and drug tests, submit to checks of their driving and criminal records, and fulfill the FedEx Home training requirement. FedEx Home assigns work to the drivers hired by the multiple route contractors by designating, for the most part, which packages they will deliver. These drivers must drive a truck that meets FedEx Home specifications and has the FedEx Home logo. They must wear a FedEx Home uniform. They perform the exact same work as the contractors, and are required to follow FedEx Home guidelines regarding the scanning of packages, driver release, and the Safe Driving Program.[79] Notwithstanding my finding that the drivers regularly employed by the multiple route contractors are employees of FedEx Home, however, I find that the record is insufficient to determine whether, as argued by FedEx Home, they lack a sufficient community of interest with the contractors to warrant their inclusion in the unit. Accordingly, I shall permit them to vote under challenge.

I find that the multiple route contractors should be excluded from the unit as statutory supervisors of FedEx Home employees. Pursuant to Section 2(11) of the Act, the term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or

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[78] 305 NLRB 150 (1991).

[79] In concluding that the multiple route contractors are employees of FedEx Home, I acknowledge that the Operating Agreement states in a section entitled "Employment of Qualified Persons" that "Contractor understands and agrees that [persons employed or provided by the Contractor] shall not be considered employees of FHD…." I find that this factor is outweighed by the factors described above.

discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, where the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. To qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in Section 2(11) of the Act. Rather, possession of any one of them is sufficient to confer supervisory status. *Chicago Metallic Corp.*[80] Isolated or sporadic exercise of authority is insufficient to establish supervisory status. *Byers Engineering Corp.*[81] The burden of proving supervisory status rests on the party alleging that such status exists. *NLRB v. Kentucky River Community Care*.[82]

The multiple route contractors hire the drivers who operate their routes, determine their pay, benefits, and schedule, grant them time off, and have authority to fire them. They exercise this supervisory authority over these drivers on a daily and ongoing basis.[83] I find that this authority is sufficient to demonstrate their supervisory status. Even in the event that the drivers are later excluded from the unit for lack of a sufficient community of interest, the fact that the multiple route contractors exercise this authority over non-unit employees does not preclude the Board from finding them to be statutory supervisors, where the performance of their supervisory functions is part and parcel of their "primary work product" rather than an ancillary part of their duties. *Union Square*

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[80] 273 NLRB 1677, 1689 (1985).

[81] 324 NLRB 740, 741 (1997), citing *Bowne of Houston*, 280 NLRB 1222, 1223 (1986).

[82] 532 U.S. 706, 121 S.Ct. 1861, 167 LRRM 2164 (2001).

[83] No party contends that contractors who occasionally hire drivers or helpers on a temporary basis are statutory supervisors.

*Theater Management, Inc.*;[84] *Pepsi-Cola Co.*[85] Here, the contractors' operating agreements give them the explicit right to hire other drivers to perform FedEx Home work, so that the supervision of these drivers is clearly part of their primary work product. Accordingly, I shall exclude the multiple route contractors from the unit as statutory supervisors.

Accordingly, based upon the foregoing and the stipulations of the parties at the hearing, I find that the following employees of the Employer constitute separate units appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time contractors and swing contractors employed by the Employer at its 8 Jewel Drive facility in Wilmington, Massachusetts, but excluding temporary drivers, helpers employed by contractors, package handlers, guards, and supervisors as defined in the Act.
>
> All full-time and regular part-time contractors and swing contractors employed by the Employer at its 375 Ballardvale Street facility in Wilmington, Massachusetts, but excluding temporary drivers, helpers employed by contractors, package handlers, guards, and supervisors as defined in the Act.

## DIRECTION OF ELECTIONS

Elections by secret ballot shall be conducted by the Regional Director among the employees in the units found appropriate at the times and places set forth in the notices of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the units who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees

[84] 326 NLRB 70, 72 (1998).

[85] 327 NLRB 1062, 1063-1064 (1999).

engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date, and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for purposes of collective bargaining by International Brotherhood of Teamsters, Local Union 25.

**LIST OF VOTERS**

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the elections should have access to lists of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*;[86] *NLRB v. Wyman-Gordon Co.*[87] Accordingly, it is hereby directed that within seven days of the date of this Decision, two copies of an election eligibility list for each unit containing the full names and addresses

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[86] 156 NLRB 1236 (1966).

[87] 394 U.S. 759 (1969).

of all the eligible voters in that unit, shall be filed by the Employer with the Regional Director, who shall make the lists available to all parties to the election. *North Macon Health Care Facility*.[88] In order to be timely filed, such lists must be received by the Regional Office, Thomas P. O'Neill, Jr. Federal Building, Sixth Floor, 10 Causeway Street, Boston, Massachusetts, on or before September 27, 2006. No extension of time to file these lists may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

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[88] 315 NLRB 359 (1994).

## RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Direction of Elections may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must by received by the Board in Washington by October 4, 2006. You may also file the request for review electronically. Further guidance may be found under E-Gov on the National Labor Relations Board web site: www.nlrb.gov.

/s/ Rosemary Pye

Rosemary Pye, Regional Director
First Region
National Labor Relations Board
Thomas P. O'Neill, Jr. Federal Building
10 Causeway Street, Sixth Floor
Boston, MA 02222-1072

Dated at Boston, Massachusetts
this 20th day of September, 2006.

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FORM NLRB-877
(2-81)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION

In the Matter of

FedEx Home Delivery

Employer

and

International Brotherhood of Teamsters Local Union No. 25

Petitioner

CASE 1-RC-22034
1-RC-22035

DATE OF MAILING
September 20, 2006

**AFFIDAVIT OF SERVICE OF copy of DECISION AND DIRECTION OF ELECTION**

**I,** the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by post-paid certified/regular mail upon the following persons, addressed to them at the following addresses:

Mr. Cal Buscy, Manager
FedEx Home Delivery
375 Ballvardale Street
Wilmington, MA 01887

Mr. Mark M. Stubley, Esq.
Ogletree, Deakins, Nash, Smoak and Stewart, P.C.
The Ogletree Building
300 North Main Street, P.O.Box 2757
Greenville, SC 29602

Mr. Steven R. Sullivan
Director of Education and Organizing
International Brotherhood of Teamsters Local Union No. 25
544 Main Street
Boston, MA 02129

Mr. Michael Hogan, Organizer
Teamsters International Council 10
P.O. Box 870
Manchester, NH 03105

Mr. Bernard P. Jeweler, Esq.
Mr. Michael J. Murphy, Esq.
Ogletree, Deakins, Nash, Smoak and Stewart, P.C.
2400 N. Street, N. W.
Fifth Floor
Washington, DC 20037

Mr. Gabriel O. Dumont, Jr., Esq.
Dumont, Morris, Burke, PC
14 Beacon Street
Suite 300
Boston, MA 02108

Mr. Bradley T. Raymond, General Counsel
International Brotherhood of Teamsters
25 Louisiana Avenue, N.W.
Washington, DC 20001

/s/ Christine Sullivan

Christine Sullivan

| | |
|---|---|
| Subscribed and sworn to before me this 20th day of September, 2006. | DESIGNATED AGENT<br>/s/ Michelle Cassata<br>Michelle Cassata<br>NATIONAL LABOR RELATIONS BOARD |

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# National Labor Relations Board

## Docket Activity for 01-RC-022034

| Date | Activity |
|---|---|
| 6/18/2007 | Decision and Certification of Representative/syh |
| 5/9/2007 | Order Granting Motion to Accept Late Documents/syh |
| 3/22/2007 | Ltr fm cnsl for Pet encl Motion for the late filing of Pet's Answering Brf and Affidavit of Michael A. Feinberg in Supp of Motion, ptys srvd (mw) |
| 3/21/2007 | Ltr to cnsl for Pet adv of late filed answering brf and that if Pet desires the Board consider answering brf, Pet must submit the required affidavit by close of business on March 28, 2007, ptys srvd (mw) (faxed) |
| 3/16/2007 | Pet's (fxd) Answering brf, ptys srvd (mw) |
| 3/15/2007 | Ltr fm cnsl for Pet adv that Pet will file an answering brf, ptys srvd (mw) |
| 3/14/2007 | Ltr fm cnsl for Pet adv that Pet will not be filing answering brf in this case, ptys srvd (mw) |
| 3/9/2007 | Empl's exceptions and brf, rec'd & ack'd. ptys srvd (mw) (hand del) |
| 2/27/2007 | Emplr's fxd req for eot to 3/9/07 to file exces to the Report on Objection rec'd & ack'd (ptys srvd)(aj) |
| 2/27/2007 | EOT to 3/9/07 to file exce's to Report on Objection (ptys srvd)(fxd)(aj) |
| 2/16/2007 | Administrative Law Judges' Report on Objection. Exces Due March 2, 2007 |
| 12/27/2006 | Formal papers w/RD's Order Consolidating Cases, Report on Objections and Notice of Hearing dtd 12/18/06 (exces due 1/2/07) (mw) |
| 11/8/2006 | Order Denying Request for Review/syh |
| 10/18/2006 | Ltr fm William Gardner Jr. (non-pty) to case requesting that BD expedite case/ptys not srvd/syh |
| 10/17/2006 | Pet's (e-filed) Opposition to Req for Rev, rec'd & ack'd. ptys srvd (mw) |
| 10/11/2006 | Empl's (Hand Delivered) req for rev w/attmts: rec'd & ack'd (ptys srvd) (lma) |
| 9/28/2006 | Eot to 10/11/06 to file req for rev (fxd)(mw) |
| 9/26/2006 | Empl's fxd req for eot to 10/11/06 to file req for rev, ptys srvd (mw) |
| 9/20/2006 | Decision and Direction of Election (req for rev due 10/4/06) (mw) |

JD–14–07
Wilmington, MA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

FEDEX HOME DELIVERY, A SEPARATE OPERATING DIVISION OF FEDEX GROUND PACKAGE SYSTEM, INC.,

Employer,

and

Cases 1–RC–22034
1–RC–22035

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION 25,

Petitioner.

**For the Employer:**
*John W. Hoag III, Esq.*
of Greenville, South Carolina
*Michael J. Murphy, Esq.*
of Washington, D.C.

**For the Petitioner:**
*Gabriel O. Dumont Jr., Esq*.
of Boston, Massachusetts
*Michael A. Feinberg, Esq.*
of Boston, Massachusetts

**For the Regional Director:**
*Emily Goldman, Esq.*
of Boston, Massachusetts
*Don C. Firenze, Esq.*
*o*f Boston Massachusetts

## ADMINISTRATIVE LAW JUDGE'S REPORT ON OBJECTIONS

### I. BACKGROUND

DAVID I. GOLDMAN, Administrative Law Judge. Pursuant to Section 9(c) of the National Labor Relations Act (Act), the International Brotherhood of Teamsters Local Union No. 25 (Union or Teamsters) filed representation petitions in the above-referenced matters. On September 20, 2006, the Regional Director of Region 1 for the National Labor Relations Board

(Board) issued a Decision and Direction of Election in these matters.[1] In it the following employees of FedEx Home Delivery, a separate operating division of FedEx Ground Package System, Inc. (FedEx or the Employer), were found to constitute separate units appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

In Case 1–RC–22034:

> All full-time and regular part-time contractors and swing contractors employed by the Employer at its 375 Ballardvale Street facility in Wilmington, Massachusetts, but excluding temporary drivers, helpers employed by contractors, package handlers, guards, and supervisors as defined in the Act.

In Case 1–RC–22035:

> All full-time and regular part-time contractors and swing contractors employed by the Employer at its 8 Jewel Drive facility in Wilmington, Massachusetts, but excluding temporary drivers, helpers employed by contractors, package handlers, guards, and supervisors as defined in the Act.

Elections in these units were conducted on October 20. The tally of ballots cast in Case 1–RC–22034 showed the following results:

| | |
|---|---|
| Approximate number of eligible voters | 14 |
| Number of void ballots | 0 |
| Number of votes cast for Petitioner | 10 |
| Number of votes case against participating labor organization | 2 |
| Number of valid votes counted | 12 |
| Number of challenged ballots | 2 |
| Number of valid votes counted plus challenged ballots | 14 |

The tally of ballots cast in Case 1–RC–22035 showed the following results:

| | |
|---|---|
| Approximate number of eligible voters | 26 |
| Number of void ballots | 0 |
| Number of votes cast for Petitioner | 14 |
| Number of votes case against participating labor organization | 6 |
| Number of valid votes counted | 20 |
| Number of challenged ballots | 5 |
| Number of valid votes counted plus challenged ballots | 25 |

## II. THE OBJECTIONS

After the election, on November 24, FedEx filed five objections to conduct affecting the results of the election in Case 1–RC–22034 and four such objections in Case 1–RC–22035. On December 18, the Regional Director for Region 1 of the Board entered an order consolidating the above-referenced cases, a report on objections, and ordered a hearing on Objections 2–5 in

[1] All dates hereafter refer to 2006 unless otherwise stated.

Case 1–RC–22034 and 2–4 in Case 1–RC–22035. I conducted the hearing in Boston Massachusetts on January 23 and 24, 2007. At the hearing, the Employer withdrew Objections 3 and 4 in Case 1–RC–22034, and Objection 3 in Case 1–RC–22035, leaving two extant objections in each case as the basis for the Employer's contention that the election results should be set aside and new elections scheduled. These objections were:

Objection 2 (in Cases 1–RC–22034 and 1–RC–22035):

> The Board's Notice of Election includes a bold, large-print "warning" specifically disclaiming Board participation or involvement in any defacement of the document, as well as specifically asserting the Board's neutrality in the election process.[1] On or about October 17, 2006, Petition abused the Board's commitment to neutrality by mailing to eligible voters a facsimile of the sample ballot contained in the official Notice of Election that had been altered by the insertion of an "X" in the box indicating the choice for the Petitioner and deleting the Board's statement of neutrality from the bottom of the Notice (see Exhibit 1). The altered ballot thereby gave voters the misleading impression that the Board favored the union in the election.

[1]The Notice of Election specifically states in large, bold lettering:
WARNING: THIS IS THE ONLY OFFICIAL NOTICE OF THIS ELECTION AND MUST NOT BE DEFACED BY ANYONE. ANY MARKINGS THAT YOU MAY SEE ON ANY SAMPLE BALLOT OR ANYWHERE ON THIS NOTICE HAVE BEEN MADE BY SOMEONE OTHER THAN THE NATIONAL LABOR RELATIONS BOARD, AND HAVE NOT BEEN PUT THERE BY THE NATIONAL LABOR RELATIONS BOARD. THE NATIONAL LABOR RELATIONS BOARD IS AN AGENCY OF THE UNITED STEATES GOVERNMENT, AND DOES NOT ENDORSE ANY CHOICE IN THE ELECTION.

The reference in the foregoing objection to Exhibit 1 is to a copy of the sample ballot document mailed by the Union. A copy was attached to the Employer's objections. An original was entered into evidence at the hearing in this case as the second page of Exhibits 2 and 3 to Joint Exhibit 1.

Objection 5 (in Case 1–RC–22034) and Objection 4 (in Case 1–RC–22035):

> Petitioner interfered with employee free choice by mailing an ambiguous handbill to eligible voters on or about October 15, 2006, indicating that it would waive initiation fees for new members (see, Exhibit 2). As the handbill does not make it clear that eligible voters who sit silent or advocate against union representation during the campaign would also be exempt, the election was tainted and must be set aside.

The reference in the foregoing objection to Exhibit 2 is to a copy of the document referencing the initiation fee. A copy was attached to the Employer's objections. An original was entered into evidence at the hearing in this case as Exhibit 1 to Joint Exhibit 1.

The parties filed briefs on February 7, 2007. Based on the testimony at the hearing, my assessment of the credibility of the witnesses and their demeanor, the documentary evidence, and the entire record before me, as well as the briefs of the parties, I make the following findings, conclusions, and recommendations.

*a. The mailing containing the marked sample ballot*

The Employer objects to the Union's mailing of literature that reproduced portions of the Board's official notice of election, specifically, the portion that included a sample ballot that the Union marked with a handwritten, red X indicating a vote in favor of representation. Before describing the Union's mailing, a description of the Board's official notice of election is in order.

The Board's official notice of election (form 707) is a one-piece document, 25-1/2 x 14", that is supplied by the Board's Regional Office and posted prior to Board representation elections in conspicuous places at the voting site. While the official notice of election is of a piece, it is comprised of three distinct parts or panels. The left 1/3 of the notice (as one faces the notice) sets forth recitations and explanations under the heading of "General" relating to topics such as the "Purpose of This Election," "Secret Ballot," "Eligibility Rules," "Special Assistance," "Challenge[s] of Voters," "Authorized Observers," and "Information Concerning Election." The middle 1/3 sets forth the specific unit covered by the upcoming election and the date, time, and place of the election, along with a sample ballot identifying the petitioner. This is the only portion of the form that is not generic. It contains information specific to the election for which the notice is being posted. The right 1/3 sets forth various rights of employees and responsibilities of the Board, and provides examples of objectionable conduct by unions or employers. Among other information, this panel states that "[t]he National Labor Relations Board as an agency of the United States Government does not endorse any choice in the election."

Above and below these 3 panels of information, the official notice of election has a legend running the width of the 25 inches at the top, in large print, that states "UNITED STATES OF AMERICA * NATIONAL LABOR RELATIONS BOARD." On the following line, again across all three panels, in even larger print is: "NOTICE OF ELECTION." Across the bottom of all 3 panels, in print smaller than the legend across the top, but bolded and larger than the text in the 3 panels, is the following: "WARNING: THIS IS THE ONLY OFFICIAL NOTICE OF THIS ELECTION AND MUST NOT BE DEFACED BY ANYONE. ANY MARKINGS THAT YOU SEE ON ANY SAMPLE BALLOT OR ANYWHERE ON THIS NOTICE HAVE BEEN MADE BY SOMEONE OTHER THAN THE NATIONAL LABOR RELATIONS BOARD AND HAVE NOT BEEN PUT THERE BY THE NATIONAL LABOR RELATIONS BOARD. THE NATIONAL LABOR RELATIONS BOARD IS AN AGENCY OF THE UNITED STATES GOVERNMENT AND DOES NOT ENDORSE ANY CHOICE IN THE ELECTION."

The Union's sample ballot document that the Employer alleges to be objectionable was mailed on or about September 16 to each bargaining unit employee listed on the *Excelsior* list used in the elections.[2] The document was mailed in an envelope with a Teamsters return address and markings, and was accompanied in the envelope by two other 1-page documents. Each of the 3 pages was 8-1/2 x 11." One, on Local 25 letterhead, bears the Teamsters logo, the name and position of Local 25's two top officers, and the slogan "We WILL only Accept Deliveries from UNION Carriers! All Other Deliveries Will Be Refused!" This page states in large letters "SPECIAL NOTICE" and "Attention!" It states that the October 20 election will be a "Secret Ballot Election!!!" and that FedEx managers (listing three of them by name) "will **NOT** know how you voted." This page of the mailing also states that supervisors and managers "will not be allowed within 150 feet of the polling place during the election hours." The bottom portion of this page stated that "IT IS TIME TO GET THE RESPECT YOU DESERVE!" AND "VOTE **'YES'** FOR A BRIGHTER FUTURE FOR YOU AND YOUR FAMILY!" At the very

[2] *Excelsior Underwear*, 156 NLRB 1236 (1966).

bottom of the page, the preprinted material continues setting forth the Local Union's address, telephone and fax number. A Teamsters' logo watermark is visible in the paper.

A second page contained the marked sample ballot to which the Employer objects. This page is a photocopy of the middle portion of the notice of election that contains a description of the bargaining unit, the date, time, and place of the election, notification that the ballots will be counted by the Board's agent at the close of voting, the sample ballot, and language beneath the sample ballot stating "DO NOT SIGN THIS BALLOT Fold and drop in ballot box. If you spoil this ballot return it to the Board Agent for a new one." Unlike the official notice of election, in the one distributed by the Teamsters the sample ballot is marked with a handwritten X in red marker, in the spot on the sample ballot indicating a vote in favor of representation. In addition, unlike the official notice of election, where the word "SAMPLE" is printed across the face of the sample ballot in blue outline, in the Union's photocopy that text is in black outline but each letter of the word "sample" is highlighted by hand with yellow marker.

The third page sent by the Union was a reproduction of the right 1/3 portion of the notice of election. As discussed, supra, it lists various rights of employees under the Act, informs employees of the Board's responsibility to protect employee rights, and provides examples of objectionable conduct by unions or employers. It also includes the statement that "[t]he National Labor Relations Board as an agency of the United States Government does not endorse any choice in the election."

The reproduced portions of the notice of election mailed by the Union, described above, fit within the borders of the 8-1/2 x 11" paper used in the mailing. However, the portions of the legends on the official notice of election that run above and below the reproduced panels were not reproduced.

*b. The mailing containing the statement regarding initiation fees*

The objected-to document referencing the absence of an initiation fee for new members is a 1-page leaflet, mailed to employees on October 12, titled "Teamster Local 25 Union Dues." Beneath a photo of coins and currency, is a subtitle reading "WHAT DO WE DO WITH YOUR UNION DUES?" Eight bullet points follow listing items such as paying business agents to negotiate contracts, hiring lawyers as needed for representation, sending funds to the Teamsters International Union, training classes, scholarships, financial support for community service, and maintaining a union hall for union members' use. The final bullet point on the list (and slightly incongruous as it is not, like the other examples, a reference to something the union expends dues on) states:

> "There is **not** an initiation fee for new members." (Original emphasis.)

## III. CONCLUSIONS

In this case, "[i]t is the Employer's burden, as the objecting party, to prove that there has been misconduct that warrants setting aside the election. If the evidence is insufficient then the Employer has failed to meet its burden." *Consumers Energy Co.*, 337 NLRB 752 (2002). In considering the force of objections, the Board applies an objective standard, under which conduct is found to be objectionable if it has "the tendency to interfere with the employees' freedom of choice." *Cedars-Sinai Medical Center*, 342 NLRB 596, 597 (2004); *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995). "The Board has long held that the 'subjective reactions of employees are irrelevant to the question of whether there was, in fact, objectionable conduct.'" *Hopkins Nursing Care Center*, 309 NLRB 958 (1992) (quoting *Beaird-Poulan Div., Emerson*

*Electric Co.*, 247 NLRB 1365, 1370 (1980)), enfd. 649 F.2d 589 (8th Cir. 1991); *Van Leer Containers, Inc.*, 298 NLRB 600 fn. 2 (1990).

In evaluating the objectionable nature of conduct, the Board considers: (1) the number of incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; (9) the degree to which the misconduct can be attributed to the party. See, e.g., *Cedars-Sinai*, supra; *Taylor Wharton Div.*, 336 NLRB 157, 158 (2001).

Before considering each of the Employer's objections, I note that at the hearing it was stipulated that both pieces of literature on which the Employer bases its objections were mailed by the Union prior to the election to each bargaining unit employee on the *Excelsior* list. The leaflet referencing the initiation fee was mailed on or about October 12. The literature containing the marked sample ballot reproduction was mailed on or about October 16. The Union declined to admit that every bargaining unit employee received the literature but agreed that it was not contesting the fact of receipt. In different circumstances the Board presumes that notification sent through the U.S. mail by an employee to a union was received. *Pattern Makers (Michigan Model Mfgrs.)*, 310 NLRB 929 (1993). Indeed, as a general matter, some courts have found that "[a] properly addressed piece of mail placed in the care of the Postal Service is presumed to have been delivered." *Hoffenberg v. Commissioner of Internal Revenue*, 905 F.2d 665, 666 (2d Cir. 1990). In the absence of any evidence to rebut the presumption of receipt I find that the two pieces of literature were received by every employee. As these documents were mailed from and to the greater Boston area on October 12 and 16, respectively, I find they were received prior to the October 20 election.

*a. The altered sample ballot*

In *SDC Investment, Inc.*, 274 NLRB 556 (1985), as expanded in subsequent cases, particularly *3-Day Blinds, Inc.*, 299 NLRB 110 (1990), the Board set forth the framework for analysis in altered or marked sample ballot cases. This framework was summarized by the Board in *Oak Hill Funeral Home*, 345 NLRB No. 35, slip op. at 3 (2005):

> First, if the source of an altered sample ballot is clearly identifiable on the face of the ballot, then the Board will find the distribution of the document not objectionable because "employees would know that the document emanated from a party, not the Board, and thus would not be led to believe that the party has been endorsed by the Board." [*SDC Investment,* supra] at 557. If, however, as here, the source of the marked sample ballot at issue is not clearly identifiable on its face, under the second prong of *SDC Investment,* "it becomes necessary to examine the nature and contents of the material in order to determine whether the document has the tendency to mislead employees into believing that the Board favors one party's cause." Id. In making this determination, the physical appearance of a document may support the conclusion that it is not misleading where the document would appear to a reasonable employee to be an obvious photocopy of an official document marked up by a party as part of its campaign propaganda. See, e.g., *Worths Stores, Corp.*, 281 NLRB 1191, 1193 (1986) (document found not misleading where "it was clear that the sample ballot had been cut from another form," that the printed material was not centered on the

page, and that markings from a photocopy machine would have led employees to conclude that the documents were not "official" Board material).

In *3-Day Blinds, Inc.*, 299 NLRB 110, 111 (1990), and the cases cited therein, the Board expanded on the *SDC* analysis. In that case, the Board made clear that in examining the nature and contents of the document at issue, an inherently fact-based exercise, it will also look to the extrinsic evidence of the document's preparation, as well as the circumstances surrounding the document's distribution. Id. at fn. 7 (citing cases). While evidence showing that a party distributed the document, without more, will not establish that the party prepared the document, it is relevant extrinsic evidence to be viewed in the totality of the circumstances of the document's distribution. Id. at 112. Likewise, evidence of the proper posting of the Board's official notice of election with its language that disavows the Board's role in any defacement and specifies the Board's neutrality in the election process will not, without more, be dispositive in cases involving a separate distribution of marked sample ballots. [Footnote omitted.] *Sofitel [San Francisco Bay*, 343 NLRB 769, 770 (2004)]. However, as the court stated in *VIP Health Care Services v. NLRB*, 82 F.3d 1122, 1130 (D.C. Cir. 1996), it is reasonable to rely on this evidence to bolster the determination that the sample ballot satisfies the *SDC Investment* analysis.

In this case, the Employer contends and the Union concedes (Union Br. at p. 3) that the source of the marked sample ballot distributed by the Union is not “clearly identifiable on the face of the ballot.” Therefore, under the *SDC* test "it becomes necessary to examine the nature and contents of the material in order to determine whether the document has the tendency to mislead employees into believing that the Board favors one party's cause." *SDC*, supra. In doing so, we conduct a “fact based exercise” and in addition to examining the nature and content of the document at issue, “look to the extrinsic evidence of the document’s preparation, as well as the circumstances surrounding the document’s distribution.”

Turning first to the physical appearance of the document itself, based on Board precedent there are points both in favor and opposed to finding that the document would have a tendency to mislead employees. The photocopying in this case was not as sloppily performed as that described in *Oak Hill Funeral Home*, supra, where the Board found the copying of truncated incomplete portions of words at the top and bottom of the flyer, and the off-center position of the text in the document, indicated that the flyer was a photocopy of another document and not “official Board material.” Here, the document at issue is fairly well centered. There are no truncated incomplete words. There are, in fact, photocopy marks running across the top and bottom of the sample ballot sent to the Ballardvale Street employees (p. 2 of Exh. 3 attached to Jt. Exh. 1), although none on the sample ballot sent to Jewel Drive. (P. 2 of Exh. 2 attached to Jt. Exh. 1). Such marks are unlikely to be part of an official Government document. On the sample ballots sent to both Jewel Drive and Ballardvale Street employees, the letters in the preprinted word “Sample” that are etched across the sample ballot have been highlighted, obviously by hand, with a yellow marker. In addition, the focus of the inquiry into the appearance of Board partisanship—the X placed in the “yes” box in the sample ballot sent to Jewel and Ballardvale employees—is the obvious product of someone’s hand using a red marker. All other printed material on the distributed document is black. Although numerous cases finding marked sample ballots objectionable involve hand-altered ballots,[3] obviously

[3]See, e.g., *Sofitel*, 343 NLRB at 769 (“large ‘X’ handwritten through the ‘yes’ box on the sample ballot”).

handwritten red markings on an otherwise black page (except for yellow highlighting over the word "sample") are, at least, a factor militating against the view that an employee would view this literature as an expression of the Board's endorsement of the Union. At least in this day and age, it seems unlikely that an employee would tend to believe that the Board's official, otherwise entirely printed documents, come with hand scrawled markings suggesting *the Board's choice* in the election (directly under printed language stating, "Mark an 'X' in the square of *your* choice" (emphasis added)). *Taylor Cadillac Inc.*, 310 NLRB 639 (1993) ("large, bold" markings in "yes" box "would be sufficiently distinct from the Board's standard preprinted sample ballots so as to preclude a reasonable impression that the markings emanated from the Board").[4]

Unlike the marked ballot in *Oak Hill*, the portion of the wording that runs across the entire official notice of election at the top and bottom was not reproduced in the document distributed in this instance. In *Oak Hill Funeral Home*, the partial phrases and words appearing above and below the unit description and sample ballot added to the impression that the employees were not in possession of an official Board document. That is not the case here where the fragments of the partial phrases and words that would have fit onto the 8-1/2 x 11" document were excised. What is left is a document with no heading at all, but only a line approximately 1/2" from the top and bottom of the page where the heading was deleted. This absence of any heading would tend to undermine the likelihood that an employee would view the marked ballot as an official document. On the other hand, the reproduced sample ballot includes the Board's seal and the words "United States of America" and "National Labor Relations Board." See *SDC Investment*, supra (Board seal taken from an official Board document and placed atop one side of the leaflet was a factor in finding that the document appeared "official").

As noted supra, the inquiry is not limited to the physical appearance of the sample ballot document. In considering whether distribution of this marked sample ballot constitutes objectionable conduct, we must consider the totality of the extrinsic circumstances, including the circumstances surrounding its preparation and distribution. In this case, these extrinsic considerations provide strong evidence supporting the rejection of the Employer's objection, because they undercut any tendency of the document to mislead employees into believing that the Board is not neutral.

First, it is stipulated by the parties that the Board's official notice of election, with its language disavowing any Board role in any markings on any sample ballot, and specifying the Board's neutrality in the election, was properly posted by the Employer in two locations at each facility. At Ballardvale, the notice was posted on October 14, six days before the election, beside the check-in cage and on a wall by the office near the voting area. At Jewel Drive, the notices were also posted October 14, at the check-in area and in the hallway entrance to the terminal office. Unlike in *Oak Hill Funeral Home*, supra, the Employer here did not conduct meetings with employees to discuss the posted notices. However, the notices were posted

[4] In his dissent in *Oak Hill Funeral Home*, supra, Chairman Battista pointed out that while an employee viewing the stray photocopying markings on the sample ballot distributed in that case "would reasonably conclude that the marks were not on the original . . . the same cannot be said about the 'X' in the box favoring the [union]. It would be reasonable for an employee to conclude that this photocopied 'X' was in the original." Slip. op. at 6. The sample ballot in that case, reproduced as an appendix to the decision, offers support for the point. By contrast, in the instant case, it would not be reasonable for an employee to conclude that the thick, red handwritten X (on a document otherwise in black type) was part of the original document.

prominently. The manager of the Jewel drive facility, Donald Clark, testified that the notice at his facility was posted in an area where all the contractors would have had the opportunity to see and to read the notice. Notably, the language in the notice of election directly anticipates and attempts to obviate any prospect of confusion based on the distribution of a marked sample ballot. It reads, in part:

> "Any markings that you see on *any sample ballot* or anywhere on this notice have been made by someone other than the National Labor Relations Board and have not been put there by the National Labor Relations Board. The National Labor Relations Board is an agency of the United States government and does not endorse any choice in the election." (Emphasis added.)

Thus, the official posted Board document directly undercuts the likelihood that an employee would be misled by the Union's sample ballot. It directly informs employees that markings they may see on "any sample ballot" are not the work of the Board. In particular, the markings at issue in this case—primarily the red X in the "yes" box but also the yellow highlighting on the words "Sample"—were clearly handwritten markings added to the preprinted document. As discussed in *VIP Health Care Services v. NLRB*, 82 F.3d 1122, 1129 (D.C. Cir. 1996), in reasoning endorsed in *Oak Hill Funeral Home*, supra, slip op. at 3, this evidence bolsters the conclusion that the employees would not reasonably tend to be misled by the marked sample ballots. See also *Dakota Premium Foods*, 335 NLRB 228 fn. 2 (2001) ("the language on the Board's revised Notices would have effectively disclaimed any participation by the Board in the preparation of the sample ballot, and would have sufficiently reassured employees of the Board's neutrality in the election"); *Comcast Cablevision of New Haven, Inc.*, 325 NLRB 833 fn. 2 (1998) (warning on official notice "provides further support for our conclusion that employees would not reasonably believe that the mock ballot emanated from the Board"). Notably, unlike the case in *Oak Hill,* the official notices with the instruction that "[a]ny markings you see on any sample ballot . . . have been made by someone other than the National Labor Relations Board and have not been put there by the National Labor Relations Board" were posted prior to the employees' receipt of the marked sample ballots, which were mailed to employees on October 16. Thus, the Board's admonition that any markings—such as that appearing on the sample ballot distributed by the Union—were not the work of the Board, was already available to employees at the time the Union's marked ballots were received.[5]

Also weighing in favor of the conclusion that employees would not be misled by the Union's marked sample ballot is the fact that the Union clearly distributed the marked ballot in question. The marked sample ballot was distributed by mail to employees, in envelopes explicitly indicating that the materials came from the Union. While distribution of a document does not, by itself, establish that a party prepared the document, it is relevant. See *Oak Hill Funeral Home*, supra; *Worth Stores Corp.*, 281 NLRB 1191, 1193 (1986).

In this case, the circumstances surrounding the distribution also diminish the prospect that employees would be misled. The marked sample ballot was provided to employees as 1 of 3 pages enclosed in the Teamsters envelope. One of the other pages was written on Union letterhead, with a Union watermark, and indicated on its face that it was from and created by the

[5]In this regard, the situation here is the opposite of that which concerned Chairman Battista, dissenting in *Oak Hill Funeral Home,* supra, slip op. at 6. There, he observed that the official notice was posted after mailing of marked ballots to employees and "[t]herefore, contrary to my colleagues, I do not believe that the Employer's subsequent posting of the official notice made the ballot acceptable under *SDC Investments*."

Union. It asks employees to vote "yes" and in tone and content is obviously part of the partisan union campaign. As found in *Oak Hill Funeral Home*, the inclusion of the sample ballot with obvious pro-Union propaganda, clearly indicating the non-governmental source, makes it less likely that employees will be misled into believing that the marked sample ballot is indicative of the Board's preference for one party. See also *VIP Health Care Services v. NLRB*, 82 F.3d at 1129 ("Even though [the sample ballot document] might not have been *stapled* to the Union letter, it was enclosed in the same envelope with clearly partisan propaganda written on Union letterhead, and the envelope itself was marked with the name of the Union") (Court's emphasis).[6]

Even more probative is the final page of the 3-page packet containing the sample ballot. It is a photocopy of the right panel of the official notice of election. This page, among things, expressly states that "[t]he National Labor Relations Board protects your right to a free choice" and also states that [t]he National Labor Relations Board as an agency of the United States Government does not endorse any choice in the election." Thus, one of the pieces of literature accompanying the mailed sample ballot—which was obviously distributed by the Union—directly rebuts the potential implication at the basis of this objection: in this case the marked sample ballot was accompanied by a document *expressly* affirming the Board's neutrality.

Finally, another factor mentioned in *Oak Hill Funeral Home*, is present here. The marked sample ballot was sent to employees as part of a union campaign that included 13 separate mailings of partisan materials to employees at each facility, in envelopes clearly identifying the materials as being from the Union. This increases the likelihood that employees "would perceive the copied sample ballot at issue as the same type of campaign propaganda" and that employees would not tend to be misled about the Board's neutrality by the marked sample ballots included in the propaganda. *Oak Hill Funeral Home*, supra, slip op. at 4.

In sum, viewed in its totality, the evidence is compelling that under all the circumstances the Union's marked sample ballot would not have a tendency to mislead employees into believing that the Board supported union representation. Under all the circumstances, employees would see the marked sample ballot as one more piece of literature developed by

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[6] *SDC Investment* counsels that "determinations must be made on a case-by-case basis," (274 NLRB at 557), and therefore the presence of clearly partisan document, whose source is identified, accompanying the marked sample ballot document, is only a factor and not dispositive of the analysis. Notwithstanding, it is a factor with great explanatory power when the ballot document itself is not clearly the work of a party. Compare cases approving of a marked sample ballot, e.g., *Oak Hill Funeral Home*, supra (marked sample ballot flyer mailed in union envelope with enclosed union business card); *Systrand Mfg. Corp.*, 328 NLRB 803 (1999) (union simultaneously handed out partisan union literature with marked sample ballots); *Baptist Home for Senior Citizens*, *Inc.*, 290 NLRB 1059 (1988) (marked ballot sample attached to obviously partisan-prepared document); *BIW Employees Federal Credit Union*, 287 NLRB 423 (1987) (same), with cases finding the marked sample ballot objectionable, e.g., *Sofitel San Francisco Bay*, 343 NLRB 769 (2004) (as discussed in *Oak Hill*, supra, in *Sofitel* marked sample ballot was only piece of alleged union propaganda distributed before election); *3-Day Blinds, Inc.*, 299 NLRB 110, 112 (1990) (rejecting contention that the sample ballot was "invariably" distributed with material clearly identifying the Employer and finding, to the contrary, "that the evidence establishes that the ballot was handed out separately and distinctly from other material"); *Archer Services, Inc.*, 298 NLRB 312 (1990) (marked ballot sample distributed with a reverse side that was also not a clearly partisan document); *SDC Investments*, supra (ballot sample leaflet and its translation handed out alone).

the Union and mailed to employees as part of the Union's campaign to urge employees to vote in favor of union representation. They could not reasonably believe that the same NLRB that declared its neutrality—in posted notices around the worksite and in the same mailing containing the marked sample ballot distributed by the Teamsters—was siding with the Teamsters and suggesting that employees vote for the Union.

In reaching this conclusion, I have considered the Employer's contention—advanced only as to the Jewel Drive facility (Case1–RC–22035)—that particular individual employees read English poorly and that this must be considered a factor that increases the tendency of the Union's marked sample ballot to mislead employees. On the evidence presented, I do not believe the contention adds to the Employer's case.

Before addressing the evidence presented in support of this contention, it is appropriate to address the uncertain legal foundation of the argument. At the hearing, the bulk of the testimony revolved around this contention, and the Union's response to it. In colloquy with the Employer's counsel regarding this issue, I expressed concern that the Employer was seeking to adduce subjective evidence to support its case. Upon consideration, I agree with the Employer that the testimony it elicited in support of this contention is not a foray into subjective evidence, an approach foreclosed by longstanding Board precedent. See, cases cited, supra. The identification of individual employees who, the Employer contends, have difficulty reading English, does not rely upon evidence of the employee's subjective reaction to the campaign literature at issue in this case. However, the Employer's focus on individual employee's reading ability raises a somewhat different question, also problematic in my view: the extent to which *individualized* assessment of employee's reading ability is permitted, and, to the extent permitted, what use can be made of it. The Employer contends that literacy problems increase the likelihood that a document will mislead employees. I am not convinced of this, or, at the least, that it is provable. I find very little firm guidance in Board precedent. There are two cases where a Board majority—asserting lack of objective evidence—rejected the dissent's assertion that Spanish-speaking employees would be particularly prone to being misled by marked sample ballots. See *Systrand Mfg. Corp.*, 328 NLRB 803 (1999), and *Dakota Premium Foods*, 335 NLRB 228 (2001). In a third case, *Archer Services, Inc.*, 298 NLRB 312 (1990), the Board found a sample ballot marked by an employer to be objectionable and therefore found irrelevant the petitioner union's added contention that Spanish-speaking employees could not read the reverse side of the document that contained a neutral description of "voting facts." In addition, the Board found the issue untimely raised in the absence of record evidence regarding the number of Spanish-speaking employees.

While these cases certainly leave open the possibility that a sufficient quantum of objective evidence would buttress the dissent's view in *Systrand* and *Dakota Premium*, and the petitioner's view in *Archer*, the cases necessarily do not reach that issue. There is also the question of what sufficient objective evidence would look like. In *Systrand*, the hearing officer's report records testimony that about 80 percent of the 80–85 percent Hispanic work force "has difficulty speaking or reading English," an incidence of language deficiency far in excess of anything presented in the instant case, but apparently not accepted as "objective evidence" in the Board majority's view.

There are, to my mind, good reasons for the Board to preclude inquiry into individual reading capabilities. The point of the Employer's evidence is to suggest that certain individuals are more susceptible to being misled because of their individual reading difficulties. A response, naturally enough, is to bring in witnesses, including some of the individuals named by the Employer and attempt to have them deny any difficulty with reading and perhaps to demonstrate their reading ability as well. If this inquiry is relevant it is hard to see where it

stops. While the Employer here focused its attention on the foreign born, reading difficulties, of course, are not limited to those with a non-English native tongue. Indeed, I do not accept, as the Employer here seems to contend, that one can generalize that there is something qualitatively different between the non-English speaking native's English language deficiencies and reading deficiencies of a native English speaker. If the Employer's evidence here is relevant then the reading difficulties of any employee—their high school reading test scores, their educational transcripts with teacher comments about their poor reading comprehension, their struggles with dyslexia—all of it would be relevant. Indeed, under the logic of the Employer's theory, difficulties with comprehension or mental functioning generally becomes relevant as it would tend to show a diminished likelihood to understand the documents in question and thereby increase the chance that an employee was misled. For no other reason than the Board's interest in expeditiously resolving representation cases, I believe that allowing the individualized assessment of bargaining unit member's reading capabilities is not a road the Board wants to travel. And one must add to this concern the great opportunity for mischief and humiliation of witnesses that it presents. Finally, one must consider the ends to which this evidence is directed. There is, to my mind, a very uncertain measure of the link between diminished reading ability and the tendency to be misled by literature. The link is not self-evident, or necessary, or, where it exists, easily susceptible to measurement. Such a link would depend on the complexity of the document in issue and the level and nature of the reading difficulties of the individual. It seems to me, almost impossible to determine—objectively—short of extensive testing, whether someone's reading skills are limited enough so that it increases the tendency of a document to mislead in any particular way.[7] A further complication is the extent of poor reading in a bargaining unit that must be proven in order for such an argument to convert an otherwise nonobjectionable document into one with a tendency to mislead.

Based on the above considerations, if I were to reach the issue, I am not sure that I would allow evidence of individual employee's reading abilities, on practical grounds, and because I believe it is not reliably probative of the issue at hand. However, I need not decide that issue because, in this case, as discussed infra, I believe that on this record the evidence does not support the Employer's contention.[8]

In support of its position, the Employer called Donald Clark, the manager in charge of the Jewel Drive facility, who reviewed a list of employees and named nine that he believed had difficulty with the written English language. Clark's examples dealt primarily with instances in which he observed that employees asked for help understanding company literature, safety issues, and customer-related mail directed to the employee, often seeking help from Manager Edward Gonzalez who speaks Spanish and English (but who has only worked at FedEx since September 2006, the month before the representation election). Gonzalez testified for the Employer that he spoke with certain of the nine employees to assist them when they did not understand a memo, campaign literature, or a safety policy that they were required to sign. Gonzalez described certain employees who would put him on the phone with a customer when there was a matter that needed to be discussed, presumably because of their poor English skills.

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[7] I note that the point advanced by the Board in *SDC,* supra, that Spanish-speaking employees will have a tendency to be misled by a misleading document translated into Spanish, is not the same claim as that advanced by the Employer here.

[8] Accordingly, I deny as moot the Union's motion to strike as irrelevant testimony relating to employees' language abilities.

I found Clark and Gonzalez' testimony exaggerated in a number of ways. There was a tendency to conflate the choice by some employees to speak their native foreign language and the need to do so in order to communicate. There was a tendency in their testimony to assume that the preference for speaking one's native language with another native speaker indicated a diminished ability to speak or read English, which does not follow. There were also inconsistencies that suggest a willingness to attribute severe language deficiencies for the purpose of advancing the Employer's case without regard to the actual abilities of the individual.

Clark named nine employees (of 27 eligible voters) at the Jewel Drive facility who, he asserted, had "difficulty" understanding written English and who did not understand certain words, phrases or concepts. The nine were: Dimas CalixNunez, Paula DaSilva, Clayton Schwann, Aguinaldo Ferriera, Mouloud Zouaoui, Amani Kouame, Fritz Padi, Ricardo Gelli, and Genaro Vargas. Of the nine employees that Clark claimed were impaired in their English ability, Gonzalez only mentioned five, even though Clark's testimony was significantly based on these employees alleged need to go over information with Gonzalez in order to understand it. Certainly, Gonzalez was asked questions designed to elicit from him all employees that he knew to have any language difficulties. Of the five he mentioned, one was Vargas, who, as discussed below, Gonzalez essentially admitted did not have language difficulties. Notably, the Employer concedes on brief that it was "particularly" only four (CalixNunez, DaSilva, Schwann, and Kouame) who needed assistance. (Employer Br. at p. 9).

That raises a question about the claims by Clark and/or Gonzalez about the other employees. Clark testified that Fritz Padi was challenged both with the spoken and the written word in English. But Gonzalez, asked to identify the employees he assisted with translation or English language problems did not mention Padi as someone who had difficulty with the English language. Padi testified at the hearing. His undisputed and credited testimony is that he has lived in the United States for the past 31 years. He attended Northeastern University and then Cambridge College where he received a master's degree in management. He sold insurance for Sentry Insurance from 1997 until 2000 and after a period of unemployment was employed by FedEx in 2003. Padi testified that he could read and write English and understand documents written in English. I credit his testimony.

Clark testified that Genaro Vargas was one of the employees who was "verbally or written challenged." Clark testified that Vargas "and my service manager [Gonzalez] often talk in Spanish about questions" and that "a lot of times [Vargas] will go to Ed [Gonzalez] after first coming to talk to me." Gonzalez testified generally that "[s]ometimes I would have to interpret or translate things for certain drivers" and indicated that some of the employees expressed a preference for speaking with him in Spanish. In response to questioning regarding which employees have indicated a preference to speak Spanish, Gonzalez identified several employees, including Vargas, with whom he mostly spoke Spanish. However, Gonzalez admitted on cross-examination that with respect to Vargas, the two often communicate in Spanish because they prefer to speak in their native language and not because they cannot communicate in English. Gonzalez' testimony misleading mentioned Vargas in a way that, without cross-examination, one would have thought that Vargas required help with English. But his admission on cross-examination demonstrated that this was not so. Vargas testified at the hearing. He has worked for FedEx since 2001. He has been in the U.S. since 1991. Vargas testified that he could understand and read English. I credit his testimony.

Clark testified that Amani Kouame, who is from the Ivory Coast, "has trouble sometimes with questions and trying to figure out answers to them" and agreed with counsel's suggestion that Kouame is among those "challenged both with the written word and the spoken word,

English word." Gonzalez testified that Kouame "speaks a very broken down version of English in which sometimes he would get literature, paper, paperwork, Company paperwork or complaints where I have to reformat it for him in a more plain spoken and simple language, you know, that he will understand." However, on cross-examination, Gonzalez grudgingly admitted that Kouame appeared in and had a speaking part—in English—in a video produced for FedEx and shown to employees as part of the election campaign. Asked if Kouame had a speaking part in the video, Gonzalez answered, "I guess you could say so, yeah." Gonzalez quickly added, "I never said the guy couldn't speak English, I just said he couldn't interpret what he was reading." But, in fact, Gonzalez did testify that Kouame "speaks a very broken down version of English," which, at best, is misleading if his English is adequate for him to appear and speak in English in a video produced by the Employer for the purpose of communicating its views on unionization to the work force. This is a particularly revealing example, but generally, I found Gonzalez' demeanor suspect, as he was obdurate at times in a manner that suggested a determination to make predetermined points instead of simply answering the question truthfully without regard to the perceived import of the answers.

None of the above reflects well on the credibility of Clark and Gonzalez, and the specific impeachment of their testimony with regard to Vargas, Padi and Kouame, leaves doubts regarding the accuracy of their testimony generally. I assume that the four employees that the Employer contends were "particularly" in need of language assistance preferred, when it was available, to obtain explanations for their questions in their native tongue. Still, I still believe, and I find that Clark and Gonzalez' testimony as to the extent of these employees' limitations was exaggerated. I credit Vargas' testimony that he had seen each of the individuals reading English documents without apparent trouble.

Of course, Vargas' credited testimony does not disprove that some employees may have been deficient in their English reading skills. But it does suggest a general ability to operate in a work environment in which English is the language used in written documents. That is, in fact, the situation at FedEx, and in addition to the tendentiousness of their testimony (specifically exposed with regard to Padi, Vargas, and Kouame), it is another reason I find that Clark and Gonzalez' testimony was exaggerated and not credible. Clark and Gonzalez' testimony would lead one to believe that the English-challenged employees would not be able to successfully work and operate in an English speaking environment. Yet FedEx operates solely in English. Every driver working for FedEx is required, as a condition of becoming a FedEx contractor, to read and sign a 28-page document entitled "The Standard Contractor Operating Agreement," which purports to govern all aspects of the employment relationship. This document is distributed by FedEx exclusively in English. Every contractor working for FedEx has signed the document, which in its final paragraph states in bolded all capitalized print that the "contractor has read and fully acknowledges" its provisions.[9] Nor is any of the other myriad of customer service inquiries, company memos, settlement accounts, or any FedEx documents provided to employees in any language other than English. On the FedEx trucks, drivers use navigation systems that provide directions in English. During the course of the union campaign, FedEx ensured that every employee received a copy of approximately 21 leaflets or flyers designed to dissuade employees from supporting the Teamsters. All of these leaflets and flyers were written exclusively in English. Similarly, as discussed, the Union's campaign included extensive mailing of literature. All of it was in English, with the exception of one leaflet that was a standard

[9] I recognize that the Standard Contractor Operating Agreement also requires contractors to acknowledge that they have been given sufficient time to consult with any appropriate advisors before executing the agreement. However, the point is that FedEx intends for the contractors to read the document carefully and expects that they can.

preprinted leaflet used in all organizing campaigns early in the process; that document was printed in English on one side and Spanish on the other. Further, there was no request in this case for foreign language ballots or notice of election posters, something common when there are English language issues.

What this evidence demonstrates is that when FedEx wanted to communicate in writing with the Jewel Drive bargaining unit employees—regardless of the subject—it used English. The Union too, in seeking to communicate with this specific bargaining unit of employees, used English. The Union could have, but did not, bring in organizers fluent in other languages to assist in this campaign. Teamsters Organizing Director Sullivan testified to something that is, I believe, self-evident, and applicable to FedEx as well as the Teamsters: in an organizing campaign effective communication is important and it is imperative that communications distributed to employees be understood by the employees.

The exclusive reliance on English undercuts the Employer's contention that difficulties by (and only allegedly by a few) members of the bargaining unit with English render the Union's marked ballot more likely to be misread as evidence of the Board's lack of neutrality. Given the importance of having one's message heard, the exclusive reliance on English by both parties to the organizing campaign provides a sort of acid test of the unit's ability to decipher campaign (and other) documents written in English. *Daikichi Sushi*, 335 NLRB at 623 ("It is reasonable to infer, moreover, that the employees—despite their imperfect command of English—understood the basic thrust of [the Employer's] speech. [The Employer] presumably believed that his speech could be understood or he would not have made it"). The exclusive reliance of FedEx on English also discredits the claims of Gonzalez and Clark. Notably, Gonzalez' role of assisting certain employees in Spanish with the review of customer service mail and other documents was not an indispensable one. Gonzalez had begun working at FedEx only in September, the month before the election. The parties stipulated that in the 5 to 6 years prior to that, no FedEx manager spoke Spanish. Thus, notwithstanding Clark and Gonzalez' contentions about the need for Gonzalez to assist certain employees by translating documents, the employees worked without such assistance prior to Gonzalez' arrival.[10]

In sum, while I am willing to assume that, at least some of the employees Gonzalez and Clark mentioned had less than average English reading skills, FedEx has failed to demonstrate a lack of facility with English that would demonstrate an increased potential for these employees to be misled by the documents in question here. If some employees' English skills were less than average, they were adequate to work—in some cases for many years—in an environment in which all written literature was in English. Prior to the hearing, neither the Employer nor the Union seemed concerned that all types of important information provided to these employees in English—from legally binding employment contracts to campaign literature—would not be understood by the intended recipients. Under these circumstances the Employer's effort to bolster its objection by contending that the employees' English skills added to the likelihood of employee confusion over the Board's neutrality, lacks a sufficient evidentiary basis.

I will recommend that this objection (Objection 2 in Cases 1–RC–22034 and 1–RC–22035) be overruled.

[10]The record indicates that Paula DaSilva, Aguinaldo Ferriera, and Amani Kouame had been employed for approximately 1 year; Mouloud Zouaoui for more than 2 years; Fritz Padi for 4 years, and Genaro Vargas for over 5 years. The record does not speak to the length of employment of Clayton Schwann, Dimas CalixNunez, or Ricardo Gelli.

*b. The Union's mailing regarding initiation fees*

The Employer contends that a union mailing explaining that "[t]here is *not* an initiation fee for new members" (original emphasis) is objectionable. In support of this objection, the Employer looks to the United States Supreme Court's ruling in *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973). As the Board recently explained, relying on *Savair*, "[a] union interferes with free choice when it offers to waive initiation fees for only those employees who manifest support for the union before an election." *S.T.A.R., Inc.*, 347 NLRB No. 8 (2006). And if the offer to waive initiation fees is ambiguous with regard to whether or not the offer is limited to those who manifest support for the union before the election, the Board holds that it is the union's duty to clarify the ambiguity. "Absent an adequate clarification, the Board will set aside an election based on an ambiguous offer to waive fees if the offer is reasonably susceptible to an interpretation that violates the principles of *Savair*." *S.T.A.R.*, supra at slip op. 1–2.

The Employer contends that the Union's statement—"there is not an initiation fee for new members"—is ambiguous, subject to multiple interpretations and plausibly could be interpreted to imply "that those who did not sign a membership card prior to the election will not be exempt from the initiation fee." (Employer Br. at 16, 17.) The Employer faults the Union for using the term "new members," as opposed to "all members" to describe those for whom there is no initiation fee, suggesting, essentially, that "new" could be understood to mean those who became members now, and only now, before the election.

I do not think a reasonable employee, or even a convocation of critical legal studies scholars could glean the interpretation advanced by the Employer. An initiation is something that happens when someone joins a group. Thus, to describe an initiation fee (or lack of one) in relation to new members is accurate and appropriate. Since the bargaining unit employees are not members of the Union, the only plausible reading is that should they choose to become so, they will, as new members, not be subject to an initiation fee. The offer is not conditioned on any requirement that they manifest support for the Union, including by becoming a new member, "now," or at anytime prior to the election.[11]

The Employer points to cases in which the Board found objectionable promises to waive initiation fees for "charter members" or for those who applied for "charter membership" in a local union being created as part of the organizing drive. See, e.g., *Coleman Co.*, 212 NLRB 927 (1974); *Inland Shoe Mfg. Co.*, 211 NLRB 724, 725 (1974). However, a "charter" member is a founding member, and therefore one of the first members of a group. In order to be a charter member one must be one of the first, or an early member of the group, thus susceptible to an interpretation that there is an immediate (i.e., perhaps a preelection) requirement to join in order to avoid initiation fees. By contrast, someone is a "new member" of a group whenever they join.

The Employer also maintains, as it did with regard to the marked sample ballot, that alleged language difficulties of certain employees bolsters this objection. I reject this contention for substantially the same reasons I rejected it with regard to the sample ballot objection. I do not believe the Employer has demonstrated that any language difficulties exist in the bargaining

[11]By way of contrast, in *Deming Division, Crane Co.*, 225 NLRB 657, 659 (1976), the Board held objectionable the statement "[t]here will be no initiation fees for anyone joining now during this campaign" because it was "susceptible of an interpretation by the employees that they must make a union commitment before the election." In the instant case, the Union's statement is not susceptible to such a reading.

unit to an extent that would support the argument that the Union's initiation fee literature reasonably could be considered ambiguous.

Stripped of a strained search for ambiguity, the Employer's contention, in essence, is that where a union broadly states that initiation fees do not apply, it must also specifically and expressly assure employees that there are not initiation fees even if they oppose the union drive or do not actively support it. Neither *Savair*, nor any Board precedent requires any such singular sensitivity to concerns of employees that are *not* based on a reasonable understanding of union statements.[12]

I will recommend that this objection (Objection 5 in Case 1–RC–22034 and Objection 4 in Case 1–RC–22035) be overruled.

[12]The Employer's brief also contends that the initiation fee statement is "susceptible to an interpretation that if [employees] voted for the Union, their initiation fee would be waived." (Employer Br. at 3, 15). The Employer's timely filed objections do not reference or encompass this contention. Accordingly, it need not be considered. *Hotel & Restaurant Employees Local 226 (Santa Fe Hotel),* 318 NLRB 829, 836 (1995); *Rhone-Poulenc, Inc.*, 271 NLRB 1008 (1984). In any event, such an objection would fail, as the Board rejects the view that "employees, faced with a perceived, albeit nonexistent, possibility that they may forfeit the fee waiver if they do not vote for the Union, may improperly feel compelled to vote for Union representation." *De Jana Industries, Inc.*, 305 NLRB 294 (1991), quoting *Molded Acoustical Products v. NLRB*, 815 F.2d 934, 939 (3d Cir. 1987), cert denied 484 U.S. 925 (1987). I also note that in its brief the Employer cites another statement in a different leaflet distributed by the Union. The leaflet, headed "Q&A Teamster Local 25 Dues and Fees," included the statement that "[y]ou will not be required to pay an initiation fee. There is no initiation fee for new members of a new group." The Employer's timely filed objection does not reference or encompass this statement. Indeed, its objection regarding the waiver of initiation fees is specifically limited to the document and statement discussed in the text. The Employer does not contend otherwise, and I do not, independently analyze this statement under *Savair*. *Hotel & Restaurant Employees Local 226 (Santa Fe Hotel),* supra; *Rhone-Poulenc, Inc.*, supra. However, even if considered in terms of support for its timely-filed objection, I do not believe that this statement renders the statement objected to by the Employer ambiguous.

## IV. RECOMMENDATIONS

On these findings of fact and conclusions and on the entire record, I issue the following recommendations:

The Employer's objections to conduct affecting the results of the elections in the above matters should be overruled. As the tally of ballots shows that the majority of valid votes counted have been cast for the Petitioner in each election, it is recommended that the Board certify the Petitioner as the collective-bargaining representative of employees in the appropriate units.[13]

Dated, Washington, D.C. February 16, 2007

David I. Goldman
Administrative Law Judge

[13]Any party may, under the provisions of Section 102.67 and 102.69 of the Board's Rules and Regulations, file exceptions to this report with the Board in Washington, D.C., within fourteen (14) days from the issuance of this report. Immediately upon filing of such exceptions, the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the Regional Director. Exceptions must be received by the Board in Washington, D.C., by March 2, 2007.

| Abbreviations | Description |
|---|---|
| ACC | Accepted |
| ACK'D | Acknowledged |
| ASST | Assistant |
| ATTACH | Attachment(s) |
| ATTMTS | Attachment(s) |
| BRF | Brief |
| CNSL | Counsel |
| CP | Charging Party |
| DEC | Decision |
| EMPL'S | Employees |
| EOT | Extension of Time |
| EXT | Extension |
| FM | From |
| FX | Fax |
| FXD | Faxed |
| GC | General Counsel |
| LTR | Letter |
| ML | Mail |
| MLD | Mailed |
| MTN | Motion |
| PTYS | Parties |
| REC'D | Received |
| RESPS | Respondents |
| SJ | Summary Judgment |
| SRVD | Served |
| SUPP | Supplemental |
| SVD | Served |
| W/ | With |

Historical Division of Judges Docket Activity For Case
01-RC-022034 FEDEX HOME DELIVERY

12/19/2006 - O CONSOL. CASES, REPORT ON OBJECTIONS AND NOH DTD 12-18-06
1/3/2007 - COMPANY OBJECTIONS TO THE ELECTION AND CONDUCT INTERFERING WITH RESULTS OF THE ELECTION. DTD 11-22-06
1/11/2007 - O/RESCH. HEARING ON OBJECTIONS TO 1/23/07 AT 11AM FAX 1/11/07

Historical Division of Judges Docket Activity For Case
01-CA-044037 FEDEX HOME DELIVERY

7/27/2006 - O/CONSOL. CASES CA-44038, CONSOL. COMPL &NOH DT 7/26/07.pdf
7/27/2007 - RD/AMENDMENT TO CONSOL. COMPL DT 7/27/07.pdf
8/10/2007 - R'S ANSWER TO AMENDED CONSOL. COMPL DTD 8/9/07.pdf
8/20/2007 - BD/O TRANSFERRING PROCEEDING &NOTICE TO SHOW CAUSE &POSTPONING INDEF DT 8/15/07

# No. 07-1391

## UNITED STATES COURT OF APPEALS
## FOR THE DISTRICT OF COLUMBIA CIRCUIT

**FEDEX HOME DELIVERY, A SEPARATE OPERATING DIVISION OF FEDEX GROUND PACKAGE SYSTEM, INC.**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

**and**

**INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL NO. 25**

**Intervenor**

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD**

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**PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD**

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**ROBERT ENGLEHART**
*Attorney*

*National Labor Relations Board*
**1099 14th Street, N.W.**
**Washington, D.C. 20570**
**(202) 273-2978**

**RONALD MEISBURG**
*General Counsel*
**JOHN E. HIGGINS, JR.**
*Deputy General Counsel*
**JOHN H. FERGUSON**
*Associate General Counsel*
**LINDA DREEBEN**
*Deputy Associate General Counsel*
*National Labor Relations Board*

# TABLE OF AUTHORITIES



## AUTHORITIES CITED

**Cases:** **Page(s)**



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* Authorities upon which we chiefly rely are marked with asterisks.

**Cases-cont'd** **Page(s)**



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* Authorities upon which we chiefly rely are marked with asterisks.

**Statutes:**



**Miscellaneous:**



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* Authorities upon which we chiefly rely are marked with asterisks.

## INTRODUCTORY STATEMENT

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure and this Court, the National Labor Relations Board respectfully petitions for rehearing, and suggests rehearing en banc, of a decision by a panel of this Court (Circuit Judge Brown and Senior Circuit Judge Williams; Circuit Judge Garland, dissenting in part), issued on April 21, 2009, denying enforcement of a Board order issued against FedEx Home Delivery, A Separate Operating Division of FedEx Ground Package System, Inc. ("FedEx"). The panel majority reversed the Board's finding that FedEx violated Section 8(a)(5) and (1) of the National Labor Relations Act (29 U.S.C. § 158(a)(5) and (1)) ("the Act"), by refusing to bargain with the International Brotherhood of Teamsters, Local Union 25 ("the Union"), which the Board had certified as the exclusive representative of single-route drivers at two facilities in Wilmington, Massachusetts. That reversal was based on the panel majority's holding that the drivers were not employees, but independent contractors within the meaning of Section 2(3) of the Act (29 U.S.C. § 152(3)).

Rehearing is warranted because the panel decision conflicts with controlling decisions of the Supreme Court and this Court. In reversing the Board, the panel majority held that a single consideration—"significant entrepreneurial opportunity for gain or loss"—was the "proxy" for distinguishing between employees and independent contractors under the Act. Slip op. 7. The correct test, set forth in

*NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968) ("*United Insurance*"), requires a reviewing court to examine multiple factors with no one factor being decisive. Under long established circuit law, binding on the panel, entrepreneurial opportunity is a factor but not the most important consideration. *North American Van Lines v. NLRB*, 869 F.2d 596, 599-600 (D.C. Cir. 1989). En banc consideration is necessary to secure and maintain uniformity of decisions on a recurring issue.

The Board submits that, if the facts are evaluated under the correct legal standard, the Board's finding that the drivers are employees must be upheld because it constitutes a "choice between two fairly conflicting views," which a reviewing court cannot displace. *United Insurance*, 390 U.S. at 260.[1]

## ARGUMENT

1. The test for differentiating between "employees," who are protected by the National Labor Relations Act, and "independent contractors" who are not, has remained unchanged since *United Insurance*. There, the Supreme Court found that

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[1] The Board does not seek rehearing of the panel's conclusion (slip op. 20; slip op. dissent 28-30) that the Board erroneously excluded national data concerning route sales. Although the Board adheres to its view that system-wide evidence of an entrepreneurial opportunity does not overcome evidence of the lack of such an opportunity in the petitioned-for unit, the Board has relied on system-wide evidence to confirm the lack of entrepreneurial opportunity in a petitioned-for unit (*see Roadway Package Systems, Inc.*, 326 NLRB 842, 851, 853 (1998)), and its exclusion here does not raise an appropriate rehearing issue.

the "obvious purpose" of Congress' 1947 decision to exclude independent contractors from the Act's definition of employee (29 U.S.C. § 152(3)) was to "have the Board and the courts apply general agency principles in distinguishing between" the two types of workers.[2] The Court emphasized that under that test "there is no shorthand formula or magic phrase" that can determine independent contractor status from case to case, and, accordingly, the determination required an evaluation of "all of the incidents of the work relationship," with "no one factor being decisive." *United Insurance*, 390 U.S. at 258. *Accord Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 752 n.31 (1989) (reaffirming principle that no one of the common-law factors is determinative).

In *Roadway Package Systems*, 326 NLRB 842, 850 (1998), the Board explicitly reaffirmed that, because "the common-law agency test encompasses a careful examination of all factors," it would consider "all the incidents of the

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[2] The common-law agency factors include: (1) the extent of control that the employing entity exercises over the details of the work; (2) whether the individual is engaged in a distinct occupation or work; (3) the kind of occupation, including whether, in the locality in question, the work is usually done under the employer's direction or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the individual supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time the individual is employed; (7) the method of payment, whether by the time or by the job; (8) whether the work in question is part of the employer's regular business; (9) whether the parties believe they are creating an employment relationship; and (10) whether the principal is in the business. *Restatement (2d) of Agency* § 220 (1957).

individual's relationship with the employing entity." The Board has consistently "[a]ppl[ied] the common-law agency test as interpreted by the Supreme Court in *NLRB v. United Insurance Co.*" *Id.* at 843. *See, e.g.*, *Arizona Republic*, 349 NLRB 1040, 1042 (2007); *Austin Tupler Trucking*, 261 NLRB 183, 184 (1982).

As Judge Garland observed (slip op. dissent 6-12), the panel majority's holding that entrepreneurial opportunity is, as a matter of law, the decisive factor in distinguishing between employee and independent-contractor status is a significant departure both from *United Insurance* and from circuit precedent. *See, e.g.*, *North American Van Lines, Inc. v. NLRB*, 869 F.2d 596, 598, 599-600, 604 (D.C. Cir. 1989) ("*NAVL*") (stating that "the ultimate determination in this case requires a broad examination of all facets of the relationship between the company and the driver," and looking to the Restatement factors for those principles). The Court's previous decisions have focused particular attention on the extent of supervision the employer exercises over the means and manner of the worker's performance. *See, e.g. NAVL*, 869 F.2d at 599; *Seattle Opera v. NLRB*, 292 F.3d 757, 765 & n.11 (D.C. Cir. 2002); *Construction, Building Material, Ice & Coal Drivers v. NLRB*, 899 F.2d 1238, 1242 (D.C. Cir. 1990). However, with the exception of one decision, *Corporate Express Delivery Systems v. NLRB*, 292 F.3d 777 (D.C. Cir. 2002) ("*Corporate Express*"), no decision of this Court can even arguably be read

as holding that entrepreneurial opportunity is the decisive factor distinguishing employees from independent contractors.

Contrary to the panel majority (slip op. 7), neither *NAVL* nor *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 858 (D.C. Cir. 1995), implicitly shifted the emphasis of the independent contractor analysis to focus on entrepreneurial opportunity as the preeminent factor. Both cases, as Judge Garland observed (slip op. dissent 7-8), examined entrepreneurial opportunity as a relevant factor, but "explicitly stated that entrepreneurial opportunity was only one of multiple factors to consider—and not the most important one." *See C.C. Eastern, Inc. v. NLRB*, 60 F.3d at 859 (noting that rights drivers retained as independent entrepreneurs had "some probative weight" but were less important than the absence of evidence that employer supervised means and manner of drivers' work); *NAVL*, 869 F.2d at 599-600 (entrepreneurial opportunity probative insofar as illuminates right of control).

The panel majority mistakenly relied (slip op. 7) on this Court's decision in *Corporate Express* as binding precedent establishing entrepreneurial opportunity as the predominant focus for distinguishing employee and independent contractor status. As Judge Garland observed (slip op. dissent 9), *Corporate Express* did not purport to overrule circuit precedent. A proper regard for the uniformity and stability of circuit law, therefore, counsels against reading that decision as having done so, where it can be read in a manner consistent with precedent. *See*

*Independent Community Bankers of America v. Board of Governors of the Federal Reserve System*, 195 F.3d 28, 34 (D.C. Cir. 1999). Under *stare decisis* principles, as Judge Garland explained, *Corporate Express* is most reasonably read "as merely holding that the Board was reasonable in determining that entrepreneurial opportunity tipped the balance in *that* case—a logical result given that the court thought the vector of the other common-law factors somewhat unclear . . ., while finding that the 'owner-operators lacked *all* entrepreneurial opportunity.'" Slip op. dissent 9 (emphasis in original), *quoting Corporate Express*, 292 F.2d at 780-81. The panel majority's reading, by contrast, amounts to a rejection of this Court's prior decisions, such as *NAVL*, 869 F.2d at 599-600, stating that entrepreneurial opportunity is a factor but not the most important factor.

Limiting the significance of *Corporate Express* is further warranted because the decision is based on a mischaracterization of Board law. Thus, the *Corporate Express* decision purports to have acted in accord with the Board's urging a shift in emphasis to entrepreneurial opportunity. 292 F.3d at 780. However, as Judge Garland observed (slip op. dissent 10), the Board's decision in *Corporate Express*, 332 NLRB 1522, 1522 (2000), does not support that claim; indeed, the Board, citing its 1998 decision in *Roadway Package Systems*, concluded that "weighing all of the incidents" of the drivers' relationship with the employer, the drivers were employees, not independent contractors.

The panel majority (slip op. 8-9), ignoring *Roadway Package Systems,* similarly mischaracterized Board precedent in suggesting that the Board's cases reflected the shift in emphasis the panel majority announced here. While the panel majority cited (slip op. 9) several cases in which the Board found individuals to be independent contractors, in each of the cases, the Board, consistent with the *Roadway Packaging* test, examined entrepreneurial opportunity among many other of the relevant factors. In *Dial-A-Mattress Operating Corporation*, 326 NLRB 884, 889, 891 (1998), the companion case to *Roadway Package Service*, numerous factors convinced the Board that, when the employer outsourced the delivery portion of its mattress business and held out the owner-operators as independent contractors to the public, those individuals were not employees. *See also Arizona Republic*, 349 NLRB 1040, 1042-1047 (2007) (quoting *Roadway Package Service*, and listing and separately considering numerous factors); *St. Joseph News Press*, 345 NLRB 474, 478-79 (2005) (same).

The panel majority's departure from Supreme Court and circuit law is not, as the panel majority suggested, justified because the multifactor common-law test is "unwieldy," and the "entrepreneurial opportunity" test purportedly allows for easier line drawing (slip op. 8). The Supreme Court adopted the common-law agency test, even though it recognized "[t]here are innumerable situations which

arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor." *United Insurance*, 390 U.S. at 258.

2. The panel majority not only erred as a matter of law in treating entrepreneurial opportunity as the decisive factor under the common-law test, but further erred in treating that factor as the "animating principle" by which to evaluate all of the common law factors, when those factors point in two directions. Slip op. 7. The panel majority's narrow focus led it improperly to subordinate or discount independent factors that supported the Board's finding of employee status.

For example, *United Insurance*, 390 U.S. at 259, clearly establishes that a person's performing functions that are an essential part of the employer's normal operations is a common-law factor that supports employee status. The panel majority inappropriately discounted this factor on the ground that, if it applied, then "FedEx could never hire delivery drivers who *are* independent contractors." Slip op. 16 (emphasis in original). The panel majority also improperly discounted other factors that, in conjunction with the essential role the drivers play in FedEx's normal operations, demonstrate FedEx's exercise of control over the drivers.

Thus, the panel majority acknowledged that FedEx requires:

> [drivers] to wear a recognizable uniform and conform to grooming standards; vehicles of particular color (white) and within a specific size range; and vehicles to display FedEx's logo in a way larger than that required by DOT regulations. The company insists that drivers complete a driving course (or have a year of commercial driving experience, which need not be with FedEx) and be insured,

> and it 'conducts two customer service rides per year' to audit performance.

Slip op. 14. The panel majority declined to accord those restrictions the weight they deserve because it improperly assumed that FedEx imposed them only to meet "customer demands," and not to exercise control over personnel essential to its business model. Slip op. 15-16. However, as Judge Garland recognized (slip op. dissent 15-17), the Board made a choice between fairly conflicting views when it found that these extensive controls supported a finding that the drivers were employees in FedEx's business. The panel majority failed appropriately to assess the practical consideration that, because the drivers are the public face of FedEx, requirements imposed to meet perceived customer demands are also integral to the public perception of the company's performance and FedEx "more likely than not would want to exercise control over such important personnel." *Aurora Packing Co. v. NLRB*, 904 F.2d 73, 76 (D.C. Cir. 1990).

3. In finding, contrary to the Board, that the drivers had significant entrepreneurial opportunity for gain or loss, the panel majority failed to accord the required deference to the Board's fact finding and its application of the common-law agency standards to those facts. While it is undisputed that the application of the law of agency to established and undisputed findings of fact "involve[s] no special administrative expertise that a court does not possess," (*United Insurance*, 390 U.S. at 260), this Court has recognized that "Congress empowered the Board

[in distinguishing between employees and independent contractors] to assess [the] significance [of the facts] in the first instance, with limited review" by the courts. *City Cab of Orlando, Inc. v. NLRB*, 628 F.2d 261, 265 (D.C. Cir. 1980). Accordingly, a reviewing court may not "'displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.'" *United Insurance*, 390 U.S. at 260 (*quoting Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)). Contrary to this standard, the panel majority repeatedly ignored or displaced well supported Board findings concerning the drivers' entrepreneurial opportunities.[3]

For example, in overturning the Board's findings, the panel majority failed to acknowledge the extent of the financial floor that FedEx provides each driver. It characterized the subsidy that FedEx provides the drivers through fuel reimbursements when prices jump sharply and a guaranteed minimum amount of income for making a vehicle available, as FedEx's willingness "to share a *small*

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[3] Addressing the standard of review, the panel majority emphasized that "the line between workers and independent contractors is jurisdictional" and described its role as ensuring that the Board exercised only the power Congress intended. Slip op. 5-6, 15 n.7, 17. The fact that independent contractors are excluded from the Act's coverage does not authorize the Court to engage in a more searching review than spelled out in *United Insurance*. *Cf. NLRB v. City Disposal Systems Inc.*, 465 U.S. 822, 830 n.7 (1984), *citing Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298 (1977) (rejecting the assertion that in "jurisdictional" cases, such as the Act's exclusion of agricultural workers, "an exception exists to the normal standard of review of Board interpretations of the Act").

part of the risk." Slip op. 16 (emphasis added). In so doing, the panel majority ignored the Board's record-based finding (JA 21, 37; 482-83), that the various subsidies that a driver gets just for showing up for work with his van—and not including any fuel reimbursement—make up 30 to 40 percent of each driver's compensation. The panel majority also ignored the evidence that FedEx helps drivers pay for expensive equipment repairs through special accounts and loan programs. (JA 14; JA 733-34, 750.)

Conversely, a driver's prospect for the type of gain that is actually entrepreneurial in nature is far more circumscribed than the panel majority found. FedEx designs its routes so that each route has the amount of business that will keep the driver busy full time, Tuesday through Saturday, but still allow for the delivery of all packages by a time certain each day. Drivers cannot refuse to deliver any assigned package unless it is damaged or weighs more than 70 pounds. (JA 332.) FedEx may, in its sole discretion, "flex" or transfer packages between drivers if a manager believes a driver has too many packages to deliver on a given day. (JA 18-19, 54 n.36, 332; 489-90, 496.) If a route begins to generate more deliveries than the driver can handle, FedEx unilaterally downsizes the route. (JA 16, 332; 704, 734.) Given these employer-imposed constraints, the Board's finding (J.A. 37) that "there is little room for the [drivers] to influence their income

through their own efforts or ingenuity" is fully supported by the record and reflects, at the very least, a fair assessment of the facts.

The panel majority also inflated the drivers' entrepreneurial opportunity by relying on slim evidence of the exercise of entrepreneurial activity as sufficient evidence of drivers' retention of a right to engage in that activity. In so reasoning, the panel majority did not appropriately heed this Court's admonition in *C.C. Eastern*, 60 F.3d at 860, that "if a company offers its workers entrepreneurial opportunities that they cannot realistically take, then that does not add any weight to the [c]ompany's claim that the workers are independent contractors." The principal example that the panel majority used for the existence of entrepreneurial opportunity is the driver's authority to sell his route when he leaves the job. Slip op. 12-14. But, as Judge Garland correctly pointed out (slip op. dissent 23), even "[t]hat theoretical possibility is tightly constrained. The drivers may sell only to those buyers whom FedEx accepts as qualified; the company gives out routes without charge, as it did at the two Wilmington terminals; and FedEx can reconfigure a route, 'in its sole discretion,' at any time," leaving even the theoretical value of any route, not in the hands of the driver, but FedEx. Despite this, the panel majority mistakenly gave determinative weight to two van sales—where a portion of the sales' price seemed ascribable to the value of the accompanying route—while not even mentioning that five routes in the bargaining

unit were abandoned for no value, actions that belie a finding that the routes have independent value. (JA 32; 430-31, 486-87, 494-95, 516-17, 628-30.) On this record, the panel majority overstepped its reviewing authority by displacing the Board's finding that route sales did not constitute evidence of significant entrepreneurial opportunity.

The panel majority (slip op. 10) also relied on one instance of commercial use of a truck by a former driver to conclude that drivers had "entrepreneurial potential" because they could use their vehicles for other commercial purposes. The panel majority failed to consider the evidence that no current drivers in the bargaining unit had ever used their vehicles for other commercial purposes. Nor did the panel majority address the evidence that the drivers are obligated to make their vans available to FedEx for full-time use, Tuesday through Saturday, and that FedEx prohibits them from delivering any other goods during that time. Based on the record evidence, the Board's finding (JA 35) that the drivers' "contractual right to engage in outside business falls within the category of 'entrepreneurial opportunities that they cannot realistically take'" clearly reflects, at the very least, a fair view of the evidence to which the Board is entitled to deference.

4. As Judge Garland observed (slip op. dissent 27), because the panel majority erroneously treated entrepreneurial opportunity as the single determinative factor, even insubstantial evidence of such opportunity could "tilt the

entire outcome." By contrast, the Board's finding that the drivers are FedEx employees represents a proper application of the multifactor test in which no one factor is decisive.

Indeed, the factors the Supreme Court found "decisive" in finding the insurance agent to be employees in *United Insurance* equally capture the relationship of the drivers to FedEx:

> the agents do not operate their own independent businesses, but perform functions that are an essential part of the company's normal operations; they need not have any prior training or experience, but are trained by the company supervisory personnel; they do business in the company's name with considerable assistance and guidance from the company and its managerial personnel and ordinarily sell only the company's policies; the 'Agent's Commission Plan' that contains the terms and conditions under which they operate is promulgated and changed unilaterally by the company; the agents account to the company for the funds they collect under an elaborate and regular reporting procedure; the agents receive the benefits of the company's vacation plan and group insurance and pension fund; and the agents have a permanent working arrangement with the company under which they may continue as long as their performance is satisfactory.

390 U.S. at 259. With the exception of not receiving insurance and pension benefits (but the drivers can elect to buy into FedEx's vacation plan), the same can be said of the FedEx drivers. The Board, accordingly, made a reasoned choice between two fairly conflicting views in determining (JA 33-39) that these factors, together with the various right of control factors favoring a finding of employee

status, predominated when balanced against the evidence of entrepreneurial opportunities realistically available to the drivers.[4]

## CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court rehear this case and suggests rehearing en banc. After rehearing, the Court should enter a judgment remanding the case for further proceedings.

/s/ Robert J. Englehart
ROBERT J. ENGLEHART
*Supervisory Attorney*
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2978

RONALD MEISBURG
*General Counsel*
JOHN E. HIGGINS, JR.
*Deputy General Counsel*
JOHN H. FERGUSON
*Associate General Counsel*
LINDA DREEBEN
*Deputy Associate General Counsel*
National Labor Relations Board
June 2009

[4] The panel majority misapprehended the Board's view of the evidence relating to multiple route drivers by suggesting that the Board deemed the evidence concerning multiple route drivers irrelevant. Slip op. 11 n.6. The Board considered that evidence (JA 27-28), but, in the circumstances, did not find it to outweigh the factors demonstrating employee status. Similarly, the Board (JA 39) did not accord significant weight to the drivers' ability occasionally to hire temporary substitutes and helpers, in the absence of record evidence indicating how that ability provided a significant entrepreneurial opportunity to the drivers. *See, e.g., Jerry Durham Drywall,* 303 NLRB 24, 36 (1991) (authority to use or hire replacements or helpers does not necessarily preclude employee status), *reviewed and reversed on other grounds,* 974 F.2d 1000 (8th Cir. 1992).

# ADDENDUM

# United States Court of Appeals

**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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Argued November 7, 2008 Decided April 21, 2009

No. 07-1391

FEDEX HOME DELIVERY, A SEPARATE OPERATING DIVISION OF FEDEX GROUND PACKAGE SYSTEM, INCORPORATED,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL NO. 25,
INTERVENOR

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Consolidated with 07-1436

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On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

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*R. Ted Cruz* argued the cause for petitioner. On the briefs were *Charles I. Cohen*, *Jonathan C. Fritts*, and *Doreen S. Davis*.

*Robert Digges Jr.*, *Robin S. Conrad*, and *Adam C. Sloane* were on the brief for *amici curiae* American Trucking Associations, Inc. and Chamber of Commerce of the United States of America in support of petitioner. *Timothy W. Wiseman* entered an appearance.

*Kellie J. Isbell*, Attorney, National Labor Relations Board, argued the cause for respondent. With her on the brief were *Ronald E. Meisburg*, General Counsel, *John H. Ferguson*, Associate General Counsel, *Linda Dreeben*, Deputy Associate General Counsel, and *Robert J. Englehart*, Supervisory Attorney. *Julie B. Broido*, Supervisory Attorney, entered an appearance.

*Renee J. Bushey* argued the cause for intervenor International Brotherhood of Teamsters, Local No. 25. With her on the brief were *Michael A. Feinberg* and *Jonathan M. Conti*.

*Daniel J. Popeo* and *Richard A. Samp* were on the brief for *amici curiae* Washington Legal Foundation, et al. in support of respondent.

Before: GARLAND and BROWN, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* BROWN.

Opinion dissenting in part filed by *Circuit Judge* GARLAND.

BROWN, *Circuit Judge*: FedEx Ground Package System, Inc. ("FedEx"), a company that provides small package delivery throughout the country, seeks review of the determination of the National Labor Relations Board

("Board") that FedEx committed an unfair labor practice by refusing to bargain with the union certified as the collective bargaining representative of its Wilmington, Massachusetts drivers. The Board cross-applies for enforcement of its order. Because the drivers are independent contractors and not employees, we grant FedEx's petition, vacate the order, and deny the cross-application for enforcement

I.

In 1998, FedEx acquired Roadway Package Systems and changed its name to FedEx Ground Package System, Inc. The company has two operating divisions: the Ground Division and the Home Delivery Division or FedEx Home. The Ground Division delivers packages of up to 150 pounds, principally to and from business customers. FedEx Home delivers packages of up to 75 pounds, mostly to residential customers. The Wilmington terminals are part of FedEx Home, a network that operates 300 stand-alone terminals throughout the United States and shares space in an additional 200 Ground Division facilities. FedEx Home has independent contractor agreements with about 4,000 contractors nationwide with responsibility for over 5,000 routes.

In July 2006, the International Brotherhood of Teamsters, Local Union 25, filed two petitions with the NLRB seeking representation elections at the Jewel Drive and Ballardvale Street terminals in Wilmington, neither of which boasts many contractors. The Union won the elections, prevailing by a vote of 14 to 6 at Jewel Drive and 10 to 2 at Ballardvale Street, and was certified as the collective bargaining representative at both. FedEx refused to bargain with the Union. The company did not contest the vote count; instead, FedEx disputed the preliminary finding that its single-route drivers are "employees" within the meaning of Section 2(3) of the National Labor Relations Act, 29 U.S.C. § 152(3).

The Board rejected FedEx's Request for Review of the Regional Director's Decision and Direction of Election on November 8, 2006. In dissent, Chairman Battista disagreed with "the refusal to permit [FedEx] to introduce system-wide evidence concerning the number of route sales and the amount of profit," as the information would be relevant to the determination of the drivers' "entrepreneurial interest in their position." *FedEx Home Delivery and Local 25*, N.L.R.B. Case Nos. 1-RC-22034, 22035, (Nov. 8, 2006) (Battista, C., dissenting). After the election, the Board found FedEx violated Sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (5), by refusing to bargain. Finding FedEx's objection that its contractors are not employees had been raised and rejected in the representation proceedings, the Board issued its order on September 28, 2007. FedEx filed a timely petition for review and the Board filed its cross-application for enforcement. The Union intervened in support of the Board's cross-application.

II.

To determine whether a worker should be classified as an employee or an independent contractor, the Board and this court apply the common-law agency test, a requirement that reflects clear congressional will. *See NLRB v. United Ins. Co.*, 390 U.S. 254, 256 (1968); *see also St. Joseph News Press*, 345 N.L.R.B. 474, 478 (2005) ("Supreme Court precedent 'teaches us not only that the common law of agency is the standard to measure employee status *but also that we have no authority to change it.*'") (quoting *Dial-A-Mattress Operating Corp.*, 326 N.L.R.B. 884, 894 (1998)). While this seems simple enough, the Restatement's non-exhaustive ten-factor test is not especially amenable to any sort of bright-line

rule,[1] a long-recognized rub.[2] Thus, "there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive," *United Ins. Co.*, 390 U.S. at 258, always bearing in mind the "legal distinction between 'employees' . . . and 'independent contractors' . . . is permeated at the fringes by conclusions drawn from the factual setting of the particular industrial dispute." *North Am. Van Lines, Inc. v. NLRB,* 869 F.2d 596, 599 (D.C. Cir. 1989) (*"NAVL"*).

This potential uncertainty is particularly problematic because the line between worker and independent contractor is jurisdictional—the Board has no authority whatsoever over independent contractors. *See id.* at 598. Consequently, it is "one of this court's principal functions" to "ensur[e] that the Board exercises power only within the channels intended by Congress," especially as determining status from undisputed

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[1] The common law factors include, *inter alia*, "the extent of control which, by the agreement, the master may exercise over the details of the work"; "the kind of occupation"; whether the worker "supplies the instrumentalities, tools, and the place of work"; "the method of payment, whether by the time or by the job"; "the length of time for which the person is employed"; whether "the work is a part of the regular business of the employer"; and the intent of the parties. RESTATEMENT (SECOND) OF AGENCY § 220(2).

[2] *See Kisner v. Jackson*, 159 Miss. 424, 427–28 (1931) ("There have been many attempts to define precisely what is meant by the term 'independent contractor'; but the variations in the wording of these attempts have resulted only in establishing the proposition that it is not possible within the limitations of language to lay down a concise definition that will furnish any universal formula, covering all cases. At last, and in any given case, it gets back to the original proposition whether in fact the contractor was actually independent.").

facts "involves no special administrative expertise that a court does not possess." *Id.* We thus do not grant great or even "normal[]" deference to the Board's status determinations; instead, we will only uphold the Board if at least "it can be said to have 'made a choice between two fairly conflicting views.'" *C.C. Eastern, Inc. v. NLRB,* 60 F.3d 855, 858 (D.C. Cir. 1995) (quoting *NAVL*, 869 F.2d at 599).

For a time, when applying this common law test, we spoke in terms of an employer's right to exercise control, making the extent of actual supervision of the means and manner of the worker's performance a key consideration in the totality of the circumstances assessment. Though all the common law factors were considered, the meta-question, as it were, focused on the sorts of controls employers could use without transforming a contractor into an employee. *E.g.*, *NAVL*, 869 F.2d at 599 ("In applying traditional agency law principles, the NLRB and the courts have adopted a right-to-control test. The test requires an evaluation of all the circumstances, but the extent of the actual *supervision* exercised . . . is the most important element."). For example, "efforts to monitor, evaluate, and improve" a worker's performance were deemed compatible with independent contractor status. *Id.* Nor would "restrictions" resulting from "government regulation" mandate a contrary conclusion. *Id.* "[E]vidence of unequal bargaining power" also did not establish "control." *Id.*

Gradually, however, a verbal formulation emerged that sought to identify the essential quantum of independence that separates a contractor from an employee, a process reflected in cases like *C.C. Eastern* and *NAVL* where we used words like control but struggled to articulate exactly what we meant by them. "Control," for instance, did not mean *all* kinds of controls, but only *certain* kinds. *See, e.g.*, *C.C. Eastern*, 60

F.3d at 858 (quoting *NAVL*, 869 F.2d at 599). Even though we were sufficiently confident in our judgment that we reversed the Board, long portions of both opinions were dedicated to explaining why some controls were more equal than others. *See id.* at 858–61; *NAVL*, 869 F.2d at 599–604. In other words, "control" was close to what we were trying to capture, but it wasn't a perfect concurrence. It was as if the sheet music just didn't quite match the tune.

In any event, the process that seems implicit in those cases became explicit—indeed, as explicit as words can be—in *Corporate Express Delivery Systems v. NLRB,* 292 F.3d 777 (D.C. Cir. 2002). In that case, both this court and the Board, while retaining all of the common law factors, "shift[ed the] emphasis" away from the unwieldy control inquiry in favor of a more accurate proxy: whether the "putative independent contractors have 'significant entrepreneurial opportunity for gain or loss.'" *Id.* at 780 (quoting *Corp. Express Delivery Sys.*, 332 N.L.R.B. No. 144, at 6 (Dec. 19, 2000)). This subtle refinement was done at the Board's urging in light of a comment to the Restatement that explains a "'full-time cook is regarded as a servant,'"—and not "an independent contractor"—"'although it is understood that the employer will exercise no control over the cooking.'" *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY § 220(1) cmt. d). Thus, while all the considerations at common law remain in play, an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism. *Id.*[3]

[3] The common law test, after all, is not merely quantitative. We do not just count the factors that favor one camp, and those the other, and declare that whichever side scores the most points wins. Instead, there also is a qualitative assessment to evaluate which factors are determinative in a particular case, and why. In

Although using this "emphasis" does not make applying the test purely mechanical, the line drawing is easier, or at least this court and the Board in *Corporate Express* seem to have so hoped. *See id.* ("We agree with the Board's suggestion that [entrepreneurial opportunity] better captures the distinction between an employee and an independent contractor."). In *C.C. Eastern*, for instance, we decided drivers for a cartage company who owned their own tractors, signed an independent contractor agreement, "retain[ed] the rights, as independent entrepreneurs, to hire their own employees" and could "use their tractors during non-business hours," and who were "paid by the job" and received no employee benefits, should be characterized as independent contractors. 60 F.3d at 858–59. We also noted the company did not require "specific work hours" or dress codes, nor did it subject workers to conventional employee discipline. *Id.* at 858. Conversely, in *Corporate Express,* emphasizing entrepreneurialism, we straightforwardly concluded that where the owner-operators "were not permitted to employ others to do the Company's work or to use their own vehicles for other jobs," they "lacked all entrepreneurial opportunity and consequently functioned as employees rather than as independent contractors." 292 F.3d at 780–81.

This struggle to capture and articulate what is meant by abstractions like "independence" and "control" also seems to play a part in the Board's own cases, though we readily concede the Board's language has not been as unambiguous as this court's binding statement in *Corporate Express*. For

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*Corporate Express*, we said this qualitative evaluation "focus[es] not upon the employer's control of the means and manner of the work but instead upon whether the putative independent contractors have a 'significant entrepreneurial opportunity for gain or loss.'" 292 F.3d at 780 (quoting *Corp. Express*, 332 N.L.R.B. at 6).

instance, in the latest but far from only statement of the principle, *see St. Joseph News Press*, 345 N.L.R.B. at 479; *Dial-A-Mattress Operating Corp.*, 326 N.L.R.B. at 891; *cf. Panhandle E. Pipe Line Co. v. FERC*, 890 F.2d 435, 438–39 (D.C. Cir. 1989) (agency action while review is pending in this court can be relevant), and a case where the Board explicitly said it was simply following its own precedent, *Arizona Republic*, 349 N.L.R.B. 1040, 1040 (2007), the Board held that where carriers sign an independent contractor agreement; own, maintain, and control their own vehicles; hire full-time substitutes and control the substitutes' terms and conditions of employment; are permitted to hold contracts on multiple routes; select the delivery sequence; and are not subject to the employer's progressive discipline system, the evidence establishes that the carriers are independent contractors, *id.* at 1040–41, 1046. Importantly, the Board, noting many drivers had "multiple routes" and could deliver newspapers for another publisher, also concluded significant entrepreneurial opportunity existed, even if most failed to make the extra effort. "[T]he fact that many carriers choose not to take advantage of this opportunity to increase their income does not mean that they do not have the entrepreneurial *potential* to do so." *Id.* at 1045.

The record here shares many of the same characteristics of entrepreneurial potential.[4] In the underlying representation decision, the Regional Director found the contractors sign a

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[4] FedEx also does not provide benefits or withhold taxes. While unrelated to entrepreneurialism, this goes to party intent. *See C.C. Eastern*, 60 F.3d at 858–59; *St. Joseph News Press*, 345 N.L.R.B. at 479.("[A] party's intent with regard to the nature of the relationship created weighs strongly in favor of finding independent contractor status."). Because we consider *all* the common law factors, *vide supra*, these facts are relevant, just as are any relating to control.

Standard Contractor Operating Agreement that specifies the contractor is not an employee of FedEx "for any purpose" and confirms the "manner and means of reaching mutual business objectives" is within the contractor's discretion, and FedEx "may not prescribe hours of work, whether or when the contractors take breaks, what routes they follow, or other details of performance"; "contractors are not subject to reprimands or other discipline"; contractors must provide their own vehicles, although the vehicles must be compliant with government regulations and other safety requirements; and "contractors are responsible for all the costs associated with operating and maintaining their vehicles." *FedEx Home Delivery and Local 25*, N.L.R.B. Case Nos. 1-RC-22034, 22035, slip op. at 10–14 (First Region, Sept. 20, 2006) ("*Representation Decision*"). They may use the vehicles "for other commercial or personal purposes . . . so long as they remove or mask all FedEx Home logos and markings," and, even on this limited record, some do use them for personal uses like moving family members, and in the past "Alan Douglas[] used his FedEx truck for his 'Douglas Delivery' delivery service, in which he delivered items such as lawn mowers for a repair company." *Id.* at 14, 15. Contractors can independently incorporate, and at least two in Wilmington have done so. At least one contractor has negotiated with FedEx for higher fees. *Id.* at 20.[5]

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[5] We recognize FedEx seeks to "make full use of the Contractor's equipment," but it is undisputed the contractors are only obligated to provide service five days a week. Our precedent speaks to this: "Moreover, as the drivers work only 40 to 50 hours per week for the Company, it seems that their schedules do not preclude them from taking on additional hauling business during their off-hours." *C.C. Eastern*, 60 F.3d at 860. Though our colleague contends *C.C. Eastern* does not say very much, *see* Dis. Op. at 26 ("But all *C.C. Eastern* held was that under those circumstances, the Board had erred in 'discounting to zero' the significance of that single factor

Tellingly, contractors may contract to serve multiple routes or hire their own employees for their single routes; more than twenty-five percent of contractors have hired their own employees at some point. *See* Resp'ts Br. at 6. "The multiple route contractors have sole authority to hire and dismiss their drivers"; they are responsible for the "drivers' wages" and "all expenses associated with hiring drivers, such as the cost of training, physical exams, drug screening, employment taxes, and work accident insurance." *Representation Decision*, slip op. at 27.[6] The drivers' pay and benefits, as well as responsibility for fuel costs and the like, are negotiated "between the contractors and their drivers." *Id.* In addition, "both multiple and single route contractors may hire drivers" as "temporary" replacements on their own routes; though they can use FedEx's "Time Off Program" to find replacement drivers when they are ill or away, they need not use this program, and not all do. *Id.* at 28–29. Thus, contrary to the dissent's depiction, Dis. Op. at 19, contractors

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in the traditional multi-factor test."), he fails to account for the holding. We did not remand for the Board to give this factor the proper weight, but instead held the contractors "are not 'employees' within the meaning of the Act and therefore are not within the jurisdiction of the Board." *C.C. Eastern*, 60 F.3d at 861.

[6] We are aware the Regional Director excluded contractors with multiple routes from the bargaining units as statutory supervisors, even though the "employees" of those "supervisors" do not, in fact, work for FedEx. *Representation Decision*, slip op. at 42–43. This classification is not before us. But what *is* before us is the puzzling argument, adopted but not defended by our colleague, *see* Dis. Op. at 23, that because they were excluded, everything about them is somehow irrelevant, as if—poof!—they just vanished. Multi-route contractors signed the same contract as the others, and just as the national data is relevant in assessing the rights available under the contract, *id.* at 27–30, so are the activities of these contractors.

do not need to show up at work every day (or ever, for that matter); instead, at their discretion, they can take a day, a week, a month, or more off, so long as they hire another to be there. "FedEx [also] is not involved in a contractor's decision to hire or terminate a substitute driver, and contractors do not even have to tell FedEx [] they have hired a replacement driver, as long as the driver is 'qualified.'" *Representation Decision*, slip op. at 29. "Contractors may also choose to hire helpers" without notifying FedEx at all; at least six contractors in Wilmington have done so. *Id.* at 29–30. This ability to hire "others to do the Company's work" is no small thing in evaluating "entrepreneurial opportunity." *Corp. Express,* 292 F.3d at 780–81; *see also St. Joseph News Press*, 345 N.L.R.B. at 479 ("Most importantly, the carriers can hire full-time substitutes . . . .").

Another aspect of the Operating Agreement is significant, and is novel under our precedent. Contractors can assign at law their contractual rights to their routes, without FedEx's permission. The logical result is they can sell, trade, give, or even bequeath their routes, an unusual feature for an employer-employee relationship. In fact, the amount of consideration for the sale of a route is negotiated "strictly between the seller and the buyer," with no FedEx involvement at all other than the new route owner must also be "qualified" under the Operating Agreement, *Representation Decision*, slip op. at 30, with "qualified" merely meaning the new owner of the route also satisfies Department of Transportation ("DOT") regulations, *see id.* at 8–10. Although FedEx assigns routes without nominal charge, the record contains evidence, as the Regional Director expressly found, that at least two contractors were able to sell routes for a profit ranging from $3,000 to nearly $16,000. *See id.* at 30–32, 38–39.

In its argument to this court, the Board, echoed by the dissent, discounts this evidence of entrepreneurial opportunity by saying any so-called profit merely represents the value of the vehicles, which were sold along with the routes. But if a vehicle depreciates in value, it is not worth as much as it was before; that is tautological. Here, buyers paid more for a vehicle and route than just the depreciated value of the vehicle—in one instance more than $10,000 more. Therefore, as the Regional Director did, we find this value *is* profit. *Compare Representation Decision*, slip op. at 38 ("Neal's profit on the sale of his route was only $3000 to $6000," and "[a]fter deducting the value of the truck . . . it appears that, at best, Ferreira paid Jung somewhere between $11,000 and $16,000 for the route.") *with* Dis. Op. at 24 (suggesting no "gain at all" may have been shown). The *amount* of profit may be "murky," as it may be as high as $6,000 and $16,000 or as low as $3,000 or $11,000, respectively, but the profit is real. *Representation Decision*, slip op. at 38. That this potential for profit exists is unsurprising: routes are geographically defined, and they likely have value dependent on those geographic specifics which some contractors can better exploit than others. For example, as people move into an area, the ability to profit from that migration varies; some contractors using more efficient methods can continue to serve the entire route, while others cannot.

It is similarly confused to conclude FedEx gives away routes for free. *See* Dis. Op. at 23. A contractor agrees to provide a service in return for compensation, i.e., both sides give consideration. If a contractor does not do what she says, FedEx suffers damages, just as she does if FedEx does not pay what is owed. Servicing a route is not cheap; one needs a truck (which the contractor pays for) and a driver (which the contractor also pays for, either directly or in kind). To say this is giving away a route is to say when one hires a

contractor to build a house, one is just giving away a construction opportunity. All of this evidence thus supports finding these contractors to be independent.

The Regional Director, however, thought FedEx's business model distinguishable from those where the Board had concluded the drivers were independent contractors. For example, FedEx requires: contractors to wear a recognizable uniform and conform to grooming standards; vehicles of particular color (white) and within a specific size range; and vehicles to display FedEx's logo in a way larger than that required by DOT regulations. The company insists drivers complete a driving course (or have a year of commercial driving experience, which need not be with FedEx) and be insured, and it "conducts two customer service rides per year" to audit performance. FedEx provides incentive pay (as well as fuel reimbursements in limited instances) and vehicle availability allotments, and requires contractors have a vehicle and driver available for deliveries Tuesday through Saturday. *Id.* at 9–21. Moreover, FedEx can reconfigure routes if a contractor cannot provide adequate service, though the contractor has five days to prove otherwise, and is entitled to monetary compensation for the diminished value of the route. *Id.* at 16. These aspects of FedEx's operation are distinguishable from the business models in *Dial-A-Mattress*, 326 N.L.R.B. 884 (contractors arranged their own training, could decline work, did not wear uniforms, could use any vehicle, and were provided no subsidies or minimum compensation) and *Argix Direct, Inc.*, 343 N.L.R.B. 1017 (2004) (contractors could decline work, delivered to major retailers using any vehicle, and had no guaranteed income).

But those distinctions, though not irrelevant, reflect differences in the type of service the contractors are providing rather than differences in the employment relationship. In

other words, the distinctions are significant but not sufficient. FedEx Home's business model is somewhat unique. The service is delivering small packages, mostly to residential customers. Unlike some trucking companies, its drivers are not delivering goods that FedEx sells or manufacturers, nor does FedEx move freight for a limited number of large clients. Instead, it is an intermediary between a diffuse group of senders and a broadly diverse group of recipients. With this model comes certain customer demands, including safety. As the Internal Revenue Service ("IRS") persuasively notes, and ordinary experience confirms, a uniform requirement often at least in part "is intended to ensure customer security rather than to control the [driver]." INTERNAL REVENUE SERVICE, EMPLOYMENT TAX GUIDELINES: CLASSIFYING CERTAIN VAN OPERATORS IN THE MOVING INDUSTRY 23, http://www.irs.gov/pub/irs-utl/van-ops.pdf (last visited April 3, 2009).[7] And once a driver wears FedEx's logo, FedEx has an interest in making sure her conduct reflects favorably on that logo, for instance by her being a safe and insured driver—which is required by DOT regulations in any event. *See Representation Decision*, slip op. at 8–9, 14, 24.

We have held that constraints imposed by customer demands and government regulations do not determine the employment relationship. *See C.C. Eastern*, 60 F.3d at 859 ("[W]here a company's control over an aspect of the workers' performance is motivated by a concern for customer service, that control does not suggest an employment relationship.");

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[7] We, of course, are *not* deferring to the IRS. *See* Dis. Op. at 15 n.10. Our standard of review here is unusual. Though not *de novo*, we must enforce the bounds on the Board's jurisdiction set by Congress. *NAVL*, 869 F.2d at 598. This statement is merely persuasive authority that is relevant in light of our precedent that measures springing from customer demands do not create an employee relationship. *C.C. Eastern*, 60 F.3d at 859.

*NAVL*, 869 F.2d at 599 ("[E]mployer efforts to monitor, evaluate, and improve the results of ends of the worker's performance do not make the worker an employee."); *id.* ("[R]estrictions upon a worker's manner and means of performance that spring from government regulation . . . do not necessarily support a conclusion of employment status" because the company "is not controlling the driver," the law is.). As our "emphasis [shifts] to entrepreneurialism," *Corp. Express*, 292 F.3d at 780, these precedents apply *a fortiori*.

Likewise, "an incentive system designed 'to ensure that the drivers' overall performance meets the company standards' . . . is fully consistent with an independent contractor relationship." *C.C. Eastern*, 60 F.3d at 860 (quoting *NAVL*, 869 F.2d at 603). At the same time, a contractual willingness to share a small part of the risk—for instance, by providing fuel reimbursements when prices jump sharply, or by guaranteeing a certain minimum amount of income for making a vehicle available—does not an employee make. *See Argix Direct, Inc.*, 343 N.L.R.B. at 1019 (contractors were independent even though the "[e]mployer also pays the owner-operators a fuel surcharge when the price of fuel surpasses a preset average").

The Regional Director also emphasized that these "contractors perform a function that is a regular and essential part of FedEx Home's normal operations, the delivery of packages," and that few have seized any of the alleged entrepreneurial opportunities. *Representation Decision*, slip op. at 34, 38. While the essential nature of a worker's role is a legitimate consideration, it is not determinative in the face of more compelling countervailing factors, *see Aurora Packing v. NLRB,* 904 F.2d 73, 76 (D.C. Cir. 1990), otherwise companies like FedEx could never hire delivery drivers who *are* independent contractors, a consequence contrary to

precedent, *see St. Joseph News Press*, 345 N.L.R.B. at 479. And both the Board and this court have found the failure to take advantage of an opportunity is beside the point. *See C.C. Eastern*, 60 F.3d at 860 (opportunities cannot be ignored unless they are the sort workers "cannot realistically take," and even "one instance" of a driver using such an opportunity can be sufficient to "show[] there is no unwritten rule or invisible barrier preventing other drivers from likewise exercising their contractual right"); *Arizona Republic*, 349 N.L.R.B. at 1045. Instead, "it is the worker's retention of the right to engage in entrepreneurial activity rather than his regular exercise of that right that is most relevant for the purpose of determining whether he is an independent contractor." *C.C. Eastern*, 60 F.3d at 860.[8]

III.

Our dissenting colleague reads our precedent differently than we do, and thus reaches a different conclusion. Of course the facts in our past holdings are not identical to those here, but there is no reason to distinguish this case from those where we have rejected the Board's attempt to assert jurisdiction over independent contractors. In fact, this case is relatively straightforward because not only do these contractors have the ability to hire others without FedEx's participation, only here do they own their routes—as in they can sell them, trade them, or just plain give them away. Moreover, if this court had shown as much deference to the Board as our colleague seems to suggest is its due, we wonder how *C.C. Eastern* and *NAVL* could possibly have been

[8] The Regional Director noted too that "FedEx Home offers what is essentially a take-it-or-leave-it agreement." But we will "draw no inference of employment status from merely the economic controls which many corporations are able to exercise over independent contractors with whom they contract." *NAVL*, 869 F.2d at 599.

decided the way that they were. Because the dispute turns on precedent, we recommend you read our cases—they are quite short—and see for yourself whether our friend's fight really is with us at all.

The dissent, for instance, argues that emphasizing entrepreneurialism has only truly begun with this case, and suggests we are doing so here for reasons apart from allegiance to precedent. *See, e.g.*, Dis. Op. at 11–12, 30. Lest any be confused, we again quote *Corporate Express*: "[W]e uphold as reasonable the Board's decision, at the urging of the General Counsel, to focus not upon the employer's control of the means and manner of the work but instead upon whether the putative independent contractors have a 'significant entrepreneurial opportunity for gain or loss.'" 292 F.3d at 780. We explicitly "agree[d] with the Board's suggestion that the latter factor better captures the distinction between an employee and an independent contractor," because, as reflected by the Restatement's comment, it is not "the degree of supervision under which [one] labors but . . . the degree to which [one] functions as an entrepreneur—that is, takes economic risk and has the corresponding opportunity to profit from working smarter, not just harder," that better illuminates one's status. *Id.* We retained the common law test (as is required by the Court's decision in *United Insurance*), but merely "shift[ed our] emphasis to entrepreneurialism," using this "emphasis" to evaluate common law factors such as whether the contractor "supplies his own equipment," *id.* *Corporate Express* is thus doctrinally consistent with *United Insurance* and the Restatement.

Likewise, though conceding ours is a "fair reading of [*Corporate Express*], which contains considerable language regarding entrepreneurial opportunity and the benefits of using such a test," the dissent nonetheless argues there is a

narrower way to understand that case such that it still focuses on the extent of control. Dis. Op. at 9. Put another way, *Corporate Express*—despite its seemingly unambiguous language—to him need not be read as evincing a shift towards entrepreneurialism at all. We cannot adopt that reading because the court affirmatively declined to determine the contractors' status under a "means and manner test." *Corp. Express*, 292 F.3d at 780 ("[W]e need not answer that question . . . ."). We take *Corporate Express* at its word.

But even if *Corporate Express* never happened, the result here is unchanged. While on some points *C.C. Eastern* and *NAVL* are distinguishable—for instance, in *C.C. Eastern* there were no appearance requirements for man or machine (though "the tractor must be suitable for the task at hand"), *see* 60 F.3d at 859, as in *NAVL*, 869 F.2d at 600—the overwhelming majority of factors favoring independent contractor status are the same, and, importantly, this case is particularly straightforward because only here can the contractors own and transfer the proprietary interest in their routes. Moreover, all contractors here own their vehicles, something that cannot be said in *NAVL*, where not even the *majority* did. *See id.* True, these drivers—who need not be, and not always are, the same persons as the contractors—must wear uniforms and the like, but a rule based on concern for customer service does not create an employee relationship. *See C.C. Eastern*, 60 F.3d at 859. And while in *C.C. Eastern* "we [were] able to find . . . only one instance of a driver" using an entrepreneurial opportunity, that lone "example show[ed] that there [was] no unwritten rule or invisible barrier preventing other drivers from likewise exercising their contractual right." *Id.* at 860. In this case, we need not and do not rely on just one example of the exercise of rights. Even on an incomplete record there are many such examples; routes have been sold for a profit; substitutes and helpers have been hired without FedEx's

involvement; one contractor has negotiated for higher rates; and contractors have incorporated. Under the fairest reading of our precedent, these *are* independent contractors.

IV.

We have considered all the common law factors, and, on balance, are compelled to conclude they favor independent contractor status. The ability to operate multiple routes, hire additional drivers (including drivers who substitute for the contractor) and helpers, and to sell routes without permission, as well as the parties' intent expressed in the contract, augurs strongly in favor of independent contractor status. Because the indicia favoring a finding the contractors are employees are clearly outweighed by evidence of entrepreneurial opportunity, the Board cannot be said to have made a choice between two fairly conflicting views. Though evidence can be marshaled and debater's points scored on both sides, the evidence supporting independent contractor status is more compelling under our precedent. The evidence might have been stronger still had not the Regional Director erroneously excluded the national data. But even as the record stands, the Board's determination was legally erroneous.

Accordingly, we grant the petition, vacate the Board's order, and deny the cross-application for enforcement.

*So ordered.*

GARLAND, *Circuit Judge*, dissenting in part: In *National Labor Relations Board v. United Insurance Co. of America*, the Supreme Court held that Congress intended "the Board and the courts" to "apply the common-law agency test . . . in distinguishing an employee from an independent contractor" under the National Labor Relations Act (NLRA). 390 U.S. 254, 256 (1968). In this case, the National Labor Relations Board (NLRB) applied that multi-factor test and concluded that FedEx Home Delivery's drivers are the company's employees. My colleagues disagree, concluding that the drivers are independent contractors.

This is not merely a factual dispute. Underlying my colleagues' conclusion is their view that the common-law test has gradually evolved until one factor -- "whether the position presents the opportunities and risks inherent in entrepreneurialism" -- has become the focus of the test. Slip Op. at 7, 18. Moreover, in their view, this factor can be satisfied by showing a few examples, or even a single instance, of a driver seizing an entrepreneurial opportunity. *Id.* at 17.

Although I do not doubt my colleagues' sincerity, I detect no such evolution. To the contrary, the Board and the courts have continued to follow the Supreme Court's injunction that "there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *United Ins.*, 390 U.S. at 258. The common-law test may well be "unwieldy," Slip Op. at 7, but a court of appeals may not "'displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.'" *United Ins.*, 390 U.S. at 260 (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)). While the NLRB may have authority to alter the focus of the common-law test, *see Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, 863-64 (1984), this court does not. Because "the least that can

be said for the Board's decision is that it made a choice between two fairly conflicting views, . . . the Court of Appeals should have enforced the Board's order." *United Ins.*, 390 U.S. at 260. Accordingly, on the existing record, I cannot join in condemning the Board's determination.

I can and do, however, fault the Board's refusal to give FedEx a fair opportunity to make its case under the appropriate test. As the court correctly notes, the Regional Director refused to permit FedEx to introduce evidence that may be relevant to the question of whether its drivers have significant entrepreneurial opportunities. Regardless of whether one considers entrepreneurial opportunity as only one factor (as it is in the common-law test) or as the focus of the test (as my colleagues believe it to be), FedEx surely had the right to introduce the evidence necessary to make its case.

## I

### A

The NLRA makes it "an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5). Section 2(3) of the Act, as amended by the 1947 Labor Management Relations Act, provides that the term "employee" "shall not include . . . any individual having the status of an independent contractor." 29 U.S.C. § 152(3). In *United Insurance*, the Supreme Court held that the "obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act. . . . Thus there is no doubt that we should apply the common-law agency test . . . in distinguishing an employee from an independent contractor."

*United Ins.*, 390 U.S. at 256.[1] The Court recognized that "[t]here are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor. . . . In such a situation as this there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles." *Id.* at 258.

The cases under review in *United Insurance* presented the question of whether certain agents of an insurance company were employees or independent contractors. The Supreme Court determined that

> the decisive factors in these cases become the following: the agents . . . perform functions that are an essential part of the company's normal operations; they need not have any prior training or experience, but are trained by company supervisory personnel; they do business in the company's name with considerable assistance and guidance from the company and its managerial personnel and ordinarily sell only the company's policies; the "Agent's Commission Plan" that contains the terms and conditions under which they operate is promulgated and changed unilaterally by the

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[1]*See also NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995) (noting that "[i]n the past, when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine" (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992) (quoting *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989)))).

> company; the agents account to the company for the funds they collect under an elaborate and regular reporting procedure; the agents receive the benefits of the company's vacation plan and group insurance and pension fund; and the agents have a permanent working arrangement with the company under which they may continue as long as their performance is satisfactory.

*Id.* at 258-59. The Court confirmed that the Board had "examined all of these facts and found that they showed the debit agents to be employees." *Id.* at 260. This finding, the Court said, "involved the application of law to facts -- what do the facts establish under the common law of agency: employee or independent contractor?" *Id.* Although the Court noted that such a determination "involved no special administrative expertise that a court does not possess," it nonetheless held that, "'even as to matters not requiring expertise,'" a court of appeals may not "'displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.'" *Id.* (quoting *Universal Camera Corp.*, 340 U.S. at 488). As long as it "can be said for the Board's decision . . . that it made a choice between two fairly conflicting views, . . . the Court of Appeals should . . . enforce[] the Board's order. It [is] error to refuse to do so." *Id.*

In the succeeding decades, the NLRB has consistently "[a]ppl[ied] the common-law agency test as interpreted by the Supreme Court in *NLRB v. United Insurance Co.*" to determine whether a worker is an employee or an independent contractor. *Roadway Package Sys., Inc.* (*Roadway III*), 326 N.L.R.B. 842, 843 (1998); *id.* at 849 (declaring that the Supreme Court's "cases teach us not only that the common law of agency is the standard to measure employee status but also that we have no authority to

change it").[2] In so doing, the Board has looked to the Restatement (Second) of Agency for the factors relevant to making that determination. *See, e.g.*, cases cited *supra* note 2. Those ten (nonexhaustive) factors are set out in the margin.[3] Following the injunction of the Supreme Court, the Board has

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[2]*Accord Ariz. Republic*, 349 N.L.R.B. 1040, 1042 (2007); *St. Joseph News-Press*, 345 N.L.R.B. 474, 477-78 (2005); *Argix Direct, Inc.*, 343 N.L.R.B. 1017, 1020 & n.13 (2004).

[3]The Restatement provides:

> In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
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> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
> (b) whether or not the one employed is engaged in a distinct occupation or business;
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
> (d) the skill required in the particular occupation;
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
> (f) the length of time for which the person is employed;
> (g) the method of payment, whether by the time or by the job;
> (h) whether or not the work is a part of the regular business of the employer;
> (i) whether or not the parties believe they are creating the relation of master and servant; and
> (j) whether the principal is or is not in business.

RESTATEMENT (SECOND) OF AGENCY § 220(2).

continued to reaffirm that "'all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.'" *Roadway III*, 326 N.L.R.B. at 850 (quoting *United Ins.*, 390 U.S. at 258); *see, e.g.*, *Ariz. Republic*, 349 N.L.R.B. at 1042-46; *St. Joseph News-Press*, 345 N.L.R.B. at 477-78.

This Circuit has likewise recognized that "Congress intended that traditional agency law principles guide the determination whether workers are employees . . . or independent contractors," *N. Am. Van Lines, Inc. v. NLRB* (*NAVL*), 869 F.2d 596, 598 (D.C. Cir. 1989), and has looked to the Restatement factors for those principles, *id.* at 599-600. *See Local 777, Democratic Union Org. Comm. v. NLRB* (*Local 777*), 603 F.2d 862, 872-73 (D.C. Cir. 1978); *cf. Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989) (citing both *United Insurance* and the Restatement's "nonexhaustive list of factors relevant to determining whether a hired party is an employee" in construing the meaning of the term "employee" under the Copyright Act of 1976). "[T]he ultimate determination," we have said, "requires a broad examination of all facets of the relationship between [the] company and" the worker. *NAVL*, 869 F.2d at 604 (citing *United Ins.*, 390 U.S. at 258); *see C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 858 (D.C. Cir. 1995). As we further noted in *NAVL*, "[i]n applying traditional agency law principles, the NLRB and the courts have adopted a right-to-control test." 869 F.2d at 599. That "test requires an evaluation of all the circumstances," but it focuses the greatest attention on those factors indicating "'the extent of the actual *supervision* exercised by a putative employer over the "means and manner" of the workers' performance.'" *Id.*

(quoting *Local 777*, 603 F.2d at 873); *see C.C. Eastern*, 60 F.3d at 858 (same).[4]

B

My colleagues contend that "[g]radually," both this Court and the Board shifted away from "the unwieldy control inquiry in favor of a more accurate proxy: whether the 'putative independent contractors have significant entrepreneurial opportunity for gain or loss.'" Slip Op. at 6-7 (quoting *Corporate Express Delivery Sys. v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002)). "[W]hile all the considerations at common law remain in play," my colleagues maintain that now the "emphasis" is on "whether the position presents the opportunities and risks inherent in entrepreneurialism." *Id.* at 7.

The cases, however, do not evidence this gradual evolution to a test that emphasizes entrepreneurial opportunity. According to my colleagues, the evolutionary process began "implicit[ly]" in our decisions in *NAVL* and *C.C. Eastern*. Slip Op. at 7. It is true that those decisions listed entrepreneurial opportunity as a relevant factor, notwithstanding that it is not expressly mentioned in either *United Insurance* or the Restatement (or in

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[4] *See also Seattle Opera v. NLRB*, 292 F.3d 757, 765 & n.11 (D.C. Cir. 2002) (applying the "common law definition" and concluding that auxiliary choristers are employees because "the Opera possesses the right to control [them] in the material details of their performance"); *Constr., Bldg. Material, Ice & Coal Drivers v. NLRB*, 899 F.2d 1238, 1242 (D.C. Cir. 1990) (noting that "[t]he right to control the 'means and manner' of job performance . . . is the *leitmotiv* recurrent in the cases" that consider whether construction truck drivers are employees or independent contractors).

any comment to the Restatement[5]). But those decisions explicitly stated that entrepreneurial opportunity was only one of multiple factors to consider -- and not the most important one.

In *C.C. Eastern*, for example, we concluded that the entrepreneurial opportunities afforded by a driver's "right to hire . . . his own employees to help him" and to "use his tractor himself to haul for anyone" had "some probative weight," but that they were "*less important* to our determination of the drivers' status than [wa]s the absence of evidence that the Company supervises the means and manner of their work." 60 F.3d at 859, 860 (emphasis added).[6] Similarly, we said in *NAVL* that: "Other factors [than control] weigh in the determination," including "the extent to which the worker has assumed entrepreneurial risk and stands to gain from risks undertaken . . . . However, *these factors are of far less importance* than the central inquiry whether the corporation exercises control over the manner and means of the details of the worker's performance; indeed, these factors are probative only to the extent that they bear upon and further that inquiry." 869 F.2d at 599-600 (emphasis added). Nothing in these unambiguous declarations suggests any kind of "struggle[] to articulate exactly what we meant" in those cases. Slip Op. at 6. The contention that *C.C.*

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[5]Restatement comment (d), to which my colleagues refer, states only that a "full-time cook is regarded as a servant" -- and *not* an independent contractor -- "although it is understood that the employer will exercise no control over the cooking." Restatement (Second) of Agency § 220(1) cmt. d. The comment does not mention entrepreneurial opportunity, which plays no role in its analysis of the cook's status.

[6]*See also C.C. Eastern*, 60 F.3d at 858 ("Whether a worker is an independent contractor or an employee is a function of the amount of control that the company has over the way in which the worker performs his job.").

*Eastern* and *NAVL* implicitly signaled the advent of an evolutionary process, *id.* at 6-7, is simply incorrect.

My colleagues cite only one case from this (or any) Circuit, our 2002 opinion in *Corporate Express*, for the proposition that entrepreneurial opportunity has "explicit[ly]" become the emphasis of the independent contractor test. Slip Op. at 7. I do not dispute that theirs is one fair reading of that opinion, which contains considerable language regarding entrepreneurial opportunity and the benefits of using such a test. But *Corporate Express* did not purport to overrule Supreme Court, Circuit, and Board precedent. Indeed, in affirming as reasonable the *Board's* determination that the owner-operator drivers in that case were *not* independent contractors, the court not only agreed that they lacked entrepreneurial opportunity, but also acknowledged that the Board may have correctly determined that the employer controlled the way in which they performed their jobs. *Corporate Express*, 292 F.3d at 779-80. Hence, *Corporate Express* can also be read as merely holding that the Board was reasonable in determining that entrepreneurial opportunity tipped the balance in *that* case -- a logical result given that the court thought the vector of the other common-law factors somewhat unclear, *see id.* at 780 & n.*, while finding that the "owner-operators lacked *all* entrepreneurial opportunity," *id.* at 780-81 (emphasis added). And when there are two possible readings of an opinion, only one of which is consistent with earlier precedent, the appropriate course is to adopt the consistent reading -- on the presumption that the court followed the command of *stare decisis*. *Cf. Indep. Cmty. Bankers of Am. v. Bd. of Governors of the Fed. Reserve Sys.*, 195 F.3d 28, 34 (D.C. Cir. 1999) ("In the event of conflicting panel opinions . . . the

earlier one controls, as one panel of this court may not overrule another." (internal quotation marks and citation omitted)).[7]

There was certainly nothing in the NLRB's opinion in *Corporate Express* to suggest that entrepreneurial opportunity had become the focus of the Board's own analysis. To the contrary, the Board simply followed its traditional approach of examining the common-law factors -- including, inter alia, both entrepreneurial opportunity and employer control. *Corporate Express Delivery Sys.*, 332 N.L.R.B. 1522, 1522 (2000). After doing so, it concluded that, "*weighing all of the incidents of their relationship* with the Respondent, we find that the owner-operators are employees and not independent contractors." *Id.* (emphasis added).

My colleagues maintain that the evolution toward an emphasis on entrepreneurial opportunity "seems to play a part in the Board's own cases," although they "readily concede the Board's language has not been . . . unambiguous." Slip Op. at 8. The principal NLRB decision upon which they rely is *Arizona Republic*, a decision issued *after* the Regional Director's decision in this case. *Ariz. Republic*, 349 N.L.R.B. 1040 (May 8, 2007). But *Arizona Republic* does not support my colleagues' proposition either. Once again, it is true that *one* of the factors weighing in favor of the independent contractor determination in that case was "entrepreneurial potential." *Id.* at 1042. There simply is no indication, however, that this factor was the

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[7]I do not suggest that *Corporate Express* should be read as "focus[ing] on the extent of control," Slip Op. at 19, but rather that it should not be read as giving primacy to entrepreneurial opportunity. Moreover, to the extent that there has been a shift of emphasis in the Board's own cases, it has been toward regarding *no* single factor as primary -- whether it be opportunity or control. *See St. Joseph News-Press*, 345 N.L.R.B. at 478; *Roadway III*, 326 N.L.R.B. at 850.

"emphasis" of the test *Arizona Republic* applied. To the contrary, the Board announced that, "[i]n determining the status of the [newspaper] carriers in this case, we rely on . . . the common-law factors." *Id.* at 1043. It then proceeded to examine the Restatement factors individually, *id.* at 1043-46, repeating its oft-stated mantra that "this list of factors is not exclusive or exhaustive, and that, in applying the common-law agency test, [we] will consider '*all* the incidents of the individual's relationship to the employing entity,'" *id.* at 1042 (quoting *Roadway III*, 326 N.L.R.B. at 850). The Board ultimately concluded that the majority of the factors "weigh[ed] in favor" of finding that the carriers were independent contractors. *Id.* at 1043-46. One of those factors was entrepreneurial opportunity; another was the employer's lack of control over the carriers. *Id.* But the Board gave pride of place to neither one, declaring only that the common-law factors, "on balance," yielded the conclusion that the carriers were independent contractors. *Id.* at 1043. The same traditional common-law analysis was employed in both of the other NLRB decisions that my colleagues cite. Slip Op. at 9.[8]

Finally, I do not dispute my colleagues' contention that the multi-factor analysis of the common law is "not especially amenable to any sort of bright-line rule." Slip Op. at 4-5. Although they acknowledge that an emphasis on entrepreneurial

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[8] *See St. Joseph News-Press*, 345 N.L.R.B. at 478 (noting that "the Board's analysis . . . [has] recognized, as does Supreme Court law, that both the right of control and other factors, as set out in the Restatement, are to be used to evaluate claims that hired individuals are independent contractors"); *Dial-A-Mattress Operating Corp.*, 326 N.L.R.B. 884, 891 (1998) (declaring that "the list of factors differentiating 'employee' from 'independent contractor' status under the common-law agency test is nonexhaustive, with no one factor being decisive").

opportunity "does not make applying the test purely mechanical," they maintain that "the line drawing is easier" under that test. *Id.* at 8. There is no question that the common-law agency test makes for difficult line drawing. Indeed, the Supreme Court expressly acknowledged as much when it announced the test. *See United Ins.*, 390 U.S. at 258 ("There are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor . . . ."). It may also be true that line drawing under an entrepreneurial opportunity test would be easier, although that is hardly assured. After all, while my colleagues perceive clear entrepreneurial opportunity in this case, neither the Board nor I see it that way. *See infra* Part II.

But the comparative practical advantage of one or the other of these two tests has no bearing on which one we must apply. Although the NLRB may have authority to alter the test, or at least to alter its focus, *see Chevron*, 467 U.S. at 842-43, 863-64, this court does not. Until the Supreme Court or the Board tells us differently, we must continue to apply the multi-factor common-law test as set forth by the Supreme Court and applied by the Board.

## II

In this case, the NLRB's Regional Director applied the traditional "common law agency test." *FedEx Home Delivery and Local 25*, N.L.R.B. Case Nos. 1-RC-22034, 22035, slip op. at 33 (First Region, Sept. 20, 2006) [hereinafter Regional Director's Decision]. In so doing, she "consider[ed] all the incidents of the individual's relationship with the employing entity," *id.*, including both the extent of FedEx's control over the drivers and the extent of the drivers' entrepreneurial opportunities, *id.* at 35-36. Although the Regional Director acknowledged many of the facts cited by my colleagues in

support of FedEx's contention that the contractors are independent contractors, facts that I do not rehearse here, she concluded that they were outweighed by other factors supporting employee status. *Id.* at 39. Part II.A reviews the bulk of the factors that the Director found to support employee status. Part II.B discusses her analysis of the issue of entrepreneurial opportunity.

A

In a lengthy and considered opinion, the Regional Director found the following facts to favor a determination that FedEx Home Delivery's drivers, whom the company calls "contractors," were employees:

> [A]ll the FedEx Home contractors perform a function that is a regular and essential part of FedEx Home's normal operations, the delivery of packages. . . . [A]ll contractors must do business in the name of FedEx Home[,] . . . wear[] FedEx Home-approved uniforms and badges, . . . [and] operate vehicles that must meet FedEx Home specifications and uniformly display the FedEx Home name, logo, and colors. . . . No prior delivery training or experience is required, and FedEx Home will train those with no experience. . . .
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> . . . [C]ontractors are not permitted to use their vehicles for other purposes while providing service for FedEx Home. The contractors have a contractual right to use their FedEx Home trucks in business activity outside their relationship with FedEx Home during off-hours, provided they remove all FedEx Home markings, but only one former multiple route contractor . . . and no current contractors at either Wilmington terminal have ever done so. . . .

> . . . FedEx Home exercises substantial control over all the contractors' performance of their functions. FedEx Home offers what is essentially a take-it-or-leave-it agreement. . . . [It] retains the right to reconfigure the service area unilaterally. All contractors must furnish a FedEx Home-approved vehicle and FedEx Home-approved driver daily from Tuesday through Saturday; they do not have discretion not to provide delivery service on a given day. While all contractors control their starting times and take breaks when they wish, their control over their work schedule is circumscribed by the requirement that all packages be delivered on the day of assignment. . . .
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> . . . FedEx Home provides support to all its contractors in various ways that are inconsistent with independent contractor status. . . . FedEx Home provides extensive support to contractors by offering the Business Support Package and arranging for the required insurance, thus providing an array of required goods and services that would be far more difficult for contractors to arrange on their own. . . . FedEx Home also offers to arrange for approved substitute drivers for its contractors by virtue of the Time Off Program. FedEx Home provides contractors who maintain sufficient vehicle maintenance accounts with $100 per accounting period to help defray repair costs[, and] requires contractors to permit FedEx Home to pay certain vehicle-related taxes and fees on their behalf and to have the payments deducted from their settlement.

Regional Director's Decision at 34-37 (internal citations omitted). Many of these are the kind of facts that *United*

*Insurance*, the Restatement, and numerous Circuit and Board decisions confirm are indicative of employee status.[9]

My colleagues nonetheless reject the import of many of these facts, arguing that they merely "reflect differences in the type of service the contractors are providing rather than differences in the employment relationship." Slip Op. at 14. In particular, the court rejects the import of the following requirements imposed by FedEx: that drivers wear a recognizable uniform; that vehicles be of a particular color and size range; that trucks display the FedEx logo in a size larger than Department of Transportation regulations require; that drivers complete a driving course if they do not have prior training; that drivers submit to two customer service rides per year to audit their performance; and that a truck and driver be available for deliveries every Tuesday through Saturday. *Id.* The courts and the Board,[10] however, have repeatedly regarded the presence or absence of these very factors as important in

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[9]*See, e.g.*, *United Ins.*, 390 U.S. at 256-58; *NAVL*, 869 F.2d at 600-04; *Local 777*, 603 F.2d at 873-81; *Argix Direct*, 343 N.L.R.B. at 1017-20; *Roadway III*, 326 N.L.R.B. at 843-48, 851-54; RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958).

[10]It is to the precedents of the Board, and not to those of the Internal Revenue Service, that we owe deference, as only the former is charged with enforcing the provisions of the NLRA. *Compare* Slip Op. at 15 (citing an IRS guideline to support the proposition that a uniform requirement does not reflect employer control), *with, e.g.*, *Roadway III*, 326 N.L.R.B. at 851-52 (citing the employer's requirement that its drivers wear an "approved uniform" as evidence that they are employees).

determining whether a worker is an employee or independent contractor.[11]

One factor that the Regional Director emphasized was that the drivers "perform a function that is a regular and essential part of FedEx Home's normal operations, the delivery of packages" to homes. Slip Op. at 16. Although my colleagues acknowledge that "the essential nature of a worker's role is a legitimate consideration," they minimize it as "not determinative." *Id.* But that is true of every factor in the common-law test. *See United Ins.*, 390 U.S. at 258 (holding that "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive"). Moreover, the cases have repeatedly cited this

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[11] *See, e.g.*, *United Ins.*, 390 U.S. at 258-59 (listing, among other "decisive factors" of employee status, the fact that the insurance agents "need not have any prior training or experience, but are trained by company supervisory personnel," and that "they do business in the company's name"); *C.C. Eastern*, 60 F.3d at 858 (finding the following facts, among many others, to be indicative of an independent contractor relationship: the employer does not "exercise any control over the drivers' dress or appearance" or "require the tractors to be of any specific type, size, or color"); *NAVL*, 869 F.2d at 600 (citing, among other "principal reasons" why the drivers are independent contractors, the fact that they "retain nearly absolute control" over "their dress" and "when they work"); *Corporate Express Delivery Sys.*, 332 N.L.R.B. at 1522 (finding that owner-operator drivers are employees because, inter alia, "[t]hey are required to display the Respondent's logo on their vehicles and to wear certain color trousers, shirts, and shoes, if they opt not to wear uniforms"); *Roadway III*, 326 N.L.R.B. at 851-52 (citing, among other factors in concluding that drivers are employees, the facts that: "they need not have any prior training or experience, but receive training from the company; they do business in the company's name"; they wear an "approved uniform"; and there is a "'business support package' [that] helps ensure that the drivers' vehicles are properly maintained").

particular factor in concluding that workers are employees.[12] In short, there is no basis for discounting the significance of the traditional factors upon which the Regional Director relied in concluding that the FedEx drivers are employees rather than independent contractors.

B

In accord with court and agency precedent, the Regional Director also considered whether FedEx Home Delivery's drivers have significant entrepreneurial opportunity for gain or loss. For the following reasons, she concluded that the evidence of entrepreneurial opportunity was weak:

> The contractors' compensation package also supports employee status. With [one] exception . . . , FedEx Home unilaterally establishes the rates of compensation for all contractors. . . . [T]here is little room for the contractors to influence their income through their own efforts or ingenuity, as their terminal manager determines, for the most part, how many deliveries they will make each day. . . . A contractor's territory may be unilaterally reconfigured by FedEx Home. FedEx Home tries to insulate its contractors from loss to some

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[12]*See, e.g.*, *United Ins.*, 390 U.S. at 258-59 (holding that the fact that the insurance agents "perform functions that are an essential part of the company's normal operations" is a "decisive factor[]"); *Aurora Packing Co. v. NLRB*, 904 F.2d 73, 76 (D.C. Cir. 1990) (noting that "whether a worker plays an essential role in a company's business" is a factor "presumably because the company more likely than not would want to exercise control over such important personnel"); *Roadway III*, 326 N.L.R.B. at 851 (citing as a factor that the drivers "perform[] essential functions that allow Roadway to compete in the small package delivery market"); *see also* RESTATEMENT (SECOND) OF AGENCY § 220(2)(h).

> degree by means of the vehicle availability payment, which they receive just for showing up, and the temporary core zone density payment, both of which payments guarantee contractors an income level predetermined by FedEx Home, irrespective of the contractors' personal initiative. FedEx Home also shields drivers from loss due to substantial increases in fuel prices by means of the fuel/mileage settlement.

Regional Director's Decision at 37.

Notwithstanding these findings, my colleagues perceive many "characteristics of entrepreneurial potential" in the drivers' relationship to FedEx. Slip Op. at 9. Some of the characteristics they cite, however, appear to have little to do with entrepreneurial opportunity. For example, the court's opinion notes that FedEx's Standard Contractor Operating Agreement "specifies the contractor is not an employee of FedEx for any purpose." *Id.* at 10. But the label FedEx puts on its relationship with its workers does not affect whether they have entrepreneurial opportunity for gain or loss.[13]

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[13] *See Corporate Express*, 292 F.3d at 780 n.* (affirming the Board's determination that, although drivers "were described in their contract as 'independent contractors,'" they were actually employees). Nor is there much significance to the fact that FedEx does not "withhold taxes." Slip. Op. at 9 n.4. *See Seattle Opera*, 292 F.3d at 764 n.8 (noting that "'if an employer could confer independent contractor [i.e., non-employee] status through the absence of payroll deductions there would be few employees falling under the protection of the Act'" (quoting *J. Huizinga Cartage Co. v. NLRB*, 941 F.2d 616, 620 (7th Cir. 1991)). *Compare also* Slip Op. at 9 n.4 (noting that FedEx "does not provide benefits"), *with Corporate Express*, 292 F.3d at 780 n.* (finding that drivers were not independent contractors notwithstanding that they "received no life or health insurance" benefits from the company).

My colleagues also observe that FedEx "may not prescribe hours of work [or] whether or when the contractors take breaks," and that the drivers "are not subject to reprimands or other discipline," Slip Op. at 10 -- all of which go not to the workers' entrepreneurial opportunity but to the extent of the employer's control, a factor discussed in Part II.A above. In any event, although FedEx does not fix specific hours or break times, it does require its contractors to provide delivery services every day, Tuesday through Saturday, and to finish each day's deliveries by the end of the day. Regional Director's Decision at 17, 36.[14] The insurance agents in *United Insurance* had neither fixed hours nor fixed break times, yet the Supreme Court affirmed the Board's determination that they were employees. *See* 390 U.S. at 258 (noting that the "agents perform their work primarily away from the company's offices and fix their own hours of work and work days"). And while FedEx does not have a disciplinary system based on "reprimands," Slip Op. at 10, it does deny drivers bonuses if they fail release audits and uses both counseling and termination as tools to ensure compliance with work rules. Regional Director's Decision at 12, 21. Again, the same was true in *United Insurance*. *See* 390 U.S. at 258 (noting that if a complaint against an agent is "well founded, the manager talks with the agent to set him straight," "caution[s]" him, and "[i]f improvement does not follow," the company may "fire [him] at any time").

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[14]The Regional Director also noted that a driver cannot take a vacation, or even a day off, when he wants to, without providing a replacement. *See* Regional Director's Decision at 26; *id.* at 40 (distinguishing other cases in part on the basis that drivers for those companies were "not required to provide delivery services each day" and "were free to elect not to accept routes on specific days"). Even those who participate in FedEx's Time Off Program must schedule vacations in advance, and weeks are assigned by seniority. *Id.* at 25-26.

In addition, my colleagues state that "[a]t least one contractor has negotiated with FedEx for higher fees." Slip Op. at 10. Without agreeing that a worker's ability to negotiate his salary takes him out of the category of "employee," the Regional Director rightly regarded the only evidence on this point as quite weak: One former manager testified that one former driver "once requested some customer service rides to gauge if his core zone payment was set properly, and the payment was raised as a result, although [the manager] was not sure by how much. There is no evidence that any other contractors at the Wilmington facilities have negotiated a change in their core zone payment." Regional Director's Decision at 20.

Closer to the mark on the issue of entrepreneurial opportunity is the court's observation that drivers "are responsible for all the costs associated with operating and maintaining their vehicles." Slip Op. at 10.[15] But FedEx does much to limit the drivers' risk of loss. As the Regional Director found, the company "shields drivers from loss due to substantial increases in fuel prices by means of the fuel/mileage settlement" and guarantees them a significant amount of income "just for showing up." Regional Director's Decision at 37. My colleagues maintain that this "contractual willingness to share a small part of the risk . . . does not an employee make." Slip Op. at 16. The NLRB reasonably differs, as to both the magnitude of the shared risk and its import.

My colleagues further note that, under the Operator Agreement, drivers "may use the vehicles for other commercial or personal purposes" when they are not in the service of FedEx,

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[15]My colleagues also note that "all contractors here own their vehicles." Slip Op. at 19. The same was true in *Corporate Express*, but we nonetheless found that those drivers had "no real entrepreneurial opportunities." 292 F.3d at 780 n.*.

"so long as they remove or mask all FedEx Home logos and markings." Slip Op. at 10. But do the drivers actually use their trucks for other purposes? Not so much. Indeed, the most that can be said is that "some do use them for personal uses like moving family members," *id.*, hardly an indicator of a "'significant entrepreneurial opportunity for gain or loss,'" *id.* at 7 (quoting *Corporate Express*, 292 F.3d at 780). Although the drivers' use of their trucks to conduct business independent of FedEx could well be an indicator of entrepreneurialism, the Regional Director found that "no current contractors at either Wilmington terminal have ever done so." Regional Director's Decision at 35.[16] Nor would they have much time, even if they wanted to. The Operator Agreement states that the company "seek[s] to manage its business so that it can provide sufficient volume of packages to Contractor *to make full use* of Contractor's equipment." FedEx Home Delivery Standard Contractor Operating Agreement, Private Background Statement (J.A. 720) (emphasis added). The contractor must provide daily service,[17] and "[w]hile the Equipment is in the service of [FedEx], it shall be used by Contractor exclusively for the carriage of the goods of [FedEx], and for no other purpose." *Id.* § 1.4 (J.A. 722).

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[16]A former manager testified that one former driver, Alan Douglass, used his truck to deliver lawn mowers for a repair company. Regional Director's Decision at 15.

[17]It is true that a driver could take on extra work on his weekends (although none do). But *C.C. Eastern* did not hold that this would make him an independent contractor, Slip Op. at 10 n.5 -- no more than taking on a second, weekend job would turn any full-time employee into an "entrepreneur."

Based on these facts, the Regional Director found that the

> "lack of pursuit of outside business activity appears to be less a reflection of entrepreneurial choice by the . . . drivers and more a matter of the obstacles created by their relationship with [the Company.]" Thus, the contractors' contractual right to engage in outside business falls within the category of "entrepreneurial opportunities that they cannot realistically take," because the contractors' work schedules prevent them from taking on additional business during their off-hours during the workweek.

Regional Director's Decision at 35 (quoting *Roadway III*, 326 N.L.R.B. at 851 & n.36). That is at least a fair conclusion, and consequently one that we may not displace. *See United Ins.*, 390 U.S. at 260.

Another indicator of entrepreneurialism to which my colleagues point is the fact that operators may hire drivers as temporary replacements and occasional helpers. I agree that the "ability to hire 'others to do the Company's work' is no small thing in evaluating 'entrepreneurial opportunity.'" Slip Op. at 12 (quoting *Corporate Express*, 292 F.3d at 780-81). *But see Roadway III*, 326 N.L.R.B. at 845 (finding that drivers are employees notwithstanding that, "without prior approval from Roadway, [they] may also use helpers or replacement drivers on their routes"). Once again, however, the record evidence on this issue was weak. The Regional Director found that "many contractors who hire substitute drivers use the FedEx Home 'temp' drivers," Regional Director's Decision at 29, and that the record did not reveal how often contractors hired outside helpers, *id.* at 30. Nor was there any evidence that any operator at the terminals at issue in this case ever hired a substitute on a full-time basis.

My colleagues also note the fact that FedEx drivers "may contract to serve multiple routes," and that if they do so, they may hire other drivers to handle those routes. Slip Op. at 11. Although this, too, may indicate entrepreneurial opportunity, there were only 3 multiple-route drivers operating out of the Wilmington facilities. Regional Director's Decision at 28. This is as compared to a case like *Arizona Republic*, in which the Board determined that newspaper carriers were independent contractors after finding that 363 of them had multiple routes. *Ariz. Republic*, 349 N.L.R.B. at 1045 n.6. Moreover, the Regional Director excluded multiple-route drivers from the bargaining unit on the ground that they were not employees but rather statutory supervisors. Regional Director's Decision at 42-43.

My colleagues find particularly significant the fact that drivers have a contractual right to sell their routes, and that this could provide an opportunity for profit. That theoretical possibility, however, is tightly constrained. The drivers may sell only to those buyers whom FedEx accepts as qualified; the company gives out routes without charge,[18] as it did at the two Wilmington terminals; and FedEx can reconfigure a route, "in its sole discretion," at any time. Regional Director's Decision at 16 (referencing the FedEx Operating Agreement); *see id.* at 38. These facts cannot help but limit (or eliminate) any opportunity for profit. *See id.* at 60 n.73.

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[18]There is nothing confused about saying that FedEx gives out routes without charge when it does not charge anything for routes. *See* Slip Op. at 13. Of course the driver agrees to provide delivery service on the route, and of course FedEx pays compensation for that service. *Id.* But the fact that FedEx will give a new driver a route without charging for it, and can reconfigure any route that a driver purchases from a former driver, plainly constrains the value of the latter.

In light of these constraints, it is not surprising that, although there was evidence that drivers abandoned their routes without selling them, *id.* at 32, there was little evidence that any driver had ever materially profited from a sale: "[T]here is no evidence that any Ballardvale contractor has ever sold a route," and there is evidence of only one single-route sale at Jewel Drive. *Id.* at 31, 38.[19] The only evidence of profit on that sale was the uncorroborated testimony of the former operator that he sold the route and truck together for at least $3000 more than the truck's market value, minus $1000 he paid to the broker. *Id.* at 31-32. As the Regional Director noted, the fact that the sale was "combined with the sale of a truck . . . makes the portion attributable to the route murky." *Id.* at 38. Based on the operator's statement alone, he may have netted no more than $2000 -- without factoring in his expenses over the two years he had the truck and route. More important, the evidence that there was any gain at all was "murky" indeed. As the Regional Director pointed out, although the operator claimed that he had a bill of sale to support his testimony, and told the hearing officer that he would produce it, he never did. *Id.* at 57 n.59. Given that the burden is on the proponent of independent contractor status

[19]The only other sale was by a multiple-route driver. The driver, Timothy Jung, received about $36,000 for his truck -- for which he had paid about $35,000 -- together with one of his routes. Jung abandoned his second route without receiving anything for it. Regional Director's Decision at 32, 38. "In these circumstances," the Regional Director reasonably found "the evidence of only two route sales too insubstantial to support a finding of independent contractor status." *Id.* at 38-39.

to prove its case,[20] it was not unreasonable for the Director to conclude that FedEx had failed to do so.

C

It would be a mistake, however, to read the court's opinion as reflecting nothing more than a factual disagreement with the NLRB, even on the question of whether the drivers had entrepreneurial opportunity. There is something more important at stake here. In concluding that the indicia of entrepreneurial opportunity were weak, the Regional Director emphasized that few operators seized any of the opportunities that allegedly were available to them. Accordingly, she adhered to the NLRB's precedent in *Roadway III*, which involved FedEx Home's predecessor corporation, wherein the "Board found that evidence of a few . . . sales . . . [was] insufficient to support a finding of independent contractor status, particularly since it was unclear from the record whether any driver had profited materially from a sale." Regional Director's Decision at 38 (citing 326 N.L.R.B. at 853).

My colleagues, by contrast, maintain that the failure to actually exercise theoretical opportunities is "beside the point" because "'it is the worker's retention of the right to engage in entrepreneurial activity rather than his regular exercise of that right that is most relevant.'" Slip Op. at 17 (quoting *C.C. Eastern*, 60 F.3d at 860). But the proper emphasis in that quotation from our *C.C. Eastern* opinion is on the word

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[20]*See Argix Direct*, 343 N.L.R.B. at 1020; *BKN, Inc.*, 333 N.L.R.B. 143, 144 (2001); *Cent. Transport, Inc.*, 247 N.L.R.B. 1482, 1483 n.1 (1980); *see also NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 710-12 (2001) (affirming the Board's rule that the burden of proof is on the party claiming that a worker is a supervisor rather than an employee).

"regular." It may not be necessary for workers to *regularly* exercise their right to engage in entrepreneurial activity for that factor to weigh in the balance, but "if a company offers its workers entrepreneurial opportunities that they cannot realistically take, then that does not add any weight to the Company's claim that the workers are independent contractors." *C.C. Eastern*, 60 F.3d at 860.

Quoting *C.C. Eastern* and citing *Arizona Republic*, my colleagues suggest that "even 'one instance' of a driver using such an opportunity can be sufficient to 'show[] there is no unwritten rule or invisible barrier preventing other drivers from likewise exercising their contractual right.'" Slip Op. at 17. But all *C.C. Eastern* held was that under those circumstances, the Board had erred in "discount[ing] to zero" the significance of that single factor in the traditional multi-factor test. *C.C. Eastern*, 60 F.3d at 860. Nor is there anything in *Arizona Republic* to suggest that the Board believes that the exercise of contractual opportunity by one or even a small number of drivers can be sufficient. In that case, "[m]any carriers h[e]ld other jobs," "40 percent of the carriers actually solicited new subscriptions," and 363 carriers -- roughly 29 percent of all carriers -- had multiple routes. 349 N.L.R.B. at 1045; *id.* at 1045 n.6. It was in this context, in which "many" carriers held other jobs, solicited business, and had multiple routes -- and hence had proven opportunity -- that the Board said "the fact that many [other] carriers choose not to take advantage of this opportunity to increase their income does not mean that they do not have the entrepreneurial *potential* to do so." *Id.* at 1045; *compare* Slip Op. at 9. In the instant case, by contrast, no FedEx driver has another job or solicits business from his delivery customers,[21]

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[21]The closest FedEx comes to contending that any driver has solicited business -- and it is not very close -- is its contention that one driver "asked the retailer L.L. Bean to ship him some catalogs to

and only three have multiple routes. Regional Director's Decision at 7, 28.

The import of my colleagues' suggestion that one or even a few examples of the exercise of contractual rights can be enough to decide the entrepreneurialism factor is magnified by their view that this factor is not just one element in a multi-factor test, but rather the test's "emphasis" -- so that an insubstantial exercise may, in effect, tilt the entire outcome.[22] That was certainly not the role that entrepreneurialism played in *C.C. Eastern*, in which we held that, although indicia of entrepreneurial opportunity did "have some probative weight," they were "less important to our determination of the drivers' status than . . . the absence of evidence that the Company supervises the means and manner of their work." 60 F.3d at 859; *see id.* at 860. Nor has it played that role in any other case.

It is not unreasonable for the NLRB to take the position that a material number of workers must actually take advantage of an opportunity before it will conclude that the opportunity is significant and realistic rather than insubstantial and theoretical. *See* Regional Director's Decision at 39. Even if that is not the better rule, "the least that can be said for the Board's decision is that it made a choice between two fairly conflicting views, and

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distribute to his customers to generate more L.L. Bean deliveries." Regional Director's Decision at 53 n.33.

[22]The significance of designating entrepreneurialism as the emphasis of the test is not diminished by saying that it is a "principle by which to evaluate [the other common-law factors] in cases where some factors cut one way and some the other." Slip Op. at 7. This is particularly true because the opinion elevates no other principle to that role. Cases in which factors cut in different directions are the only cases at issue, as no determinative principle is required when all the factors point in the same direction.

under these circumstances the Court of Appeals should have enforced the Board's order." *United Ins.*, 390 U.S. at 260.

III

But there is a rub. Perhaps recognizing the thinness of the record, FedEx attempted to improve its proof of entrepreneurial opportunity by proffering "system-wide evidence concerning the number of route sales and the amount of profit, if any, on any such sale." Order, *FedEx Home Delivery*, N.L.R.B. Case Nos. 1-RC-22034, 22035 (Nov. 8, 2006) (Battista, Chrmn., dissenting). The Regional Director, however, "refus[ed] to permit the Employer to introduce" this evidence. *Id.* In light of that refusal, the Chairman of the NLRB dissented from the denial of Board review, protesting that this "evidence may be relevant to the issue of whether the drivers have an entrepreneurial interest in their position." *Id.*

The Chairman was correct. Regardless of whether one regards entrepreneurial opportunity as only one factor or as the decisive factor in determining whether the drivers were independent contractors, FedEx surely had the right to introduce the evidence necessary to make its case. *See* 29 C.F.R. § 102.64(a) ("It shall be the duty of the hearing officer to inquire fully into all matters and issues necessary to obtain a full and complete record . . . ."); *cf. Drukker Commc'ns, Inc. v. NLRB*, 700 F.2d 727, 733 (D.C. Cir. 1983) ("It is repugnant to notions of fairness for the government to seek sanctions for alleged wrongdoing while withholding from the proceeding evidence that would demonstrate innocence.").

In support of her ruling, the Regional Director said only that "evidence of route sales and entrepreneurial activity at other terminals had no bearing on the economic value of route sales" at the Wilmington facilities. Regional Director's Decision at 6.

Why that would be so, she did not say. Perhaps there is something special about the Wilmington facilities, especially as compared to others that are far away. But the Director did not identify what the idiosyncracy might be, or say why at least evidence regarding nearby terminals would not be relevant. *See Burns Elec. Sec. Servs., Inc. v. NLRB*, 624 F.2d 403, 409 (2d Cir. 1980) (citing 29 C.F.R. § 102.64 in holding that the hearing officer erred in excluding evidence regarding the functions of certain workers at a nearby facility not within the proposed unit).

The exclusion of FedEx's evidence appears particularly arbitrary because the Regional Director did consider other evidence regarding some terminals not at issue in this case. *See* Regional Director's Decision at 4-5. So did the Board in *Roadway III*, where it relied on nationwide data to conclude that drivers were *not* independent contractors. *See* 326 N.L.R.B. at 851 (noting that "only 3 out of Roadway's 5000 drivers nationwide" had "used their vehicles for other commercial purposes"); *id.* at 853 ("In a system of over 5000 drivers assigned to over 300 terminals, we find that these few forced sales, given their circumstances, are insufficient to support a finding of independent contractor status."). And so, too, did a different Regional Director in *RPS, Inc.* *See* Decision and Order, N.L.R.B. Case No. 5-RC-14905 (Region 5, Aug. 3, 2000). That Regional Director relied on systemwide data to conclude that an employer's drivers *were* independent contractors. Although no driver at the only facility at issue in that case used his vehicle for commercial purposes unrelated to RPS's business, the Director found persuasive the fact that systemwide "many RPS drivers/contractors, possibly half" did so. *Id.* at 56. That record, the Director said, made it "clear that drivers/contractors can realistically take advantage of a myriad of entrepreneurial activities." *Id.* at 57.

In sum, the Regional Director's failure to reasonably explain her refusal to permit FedEx to prove its case requires that we grant the petition for review and remand the case.

## IV

My colleagues conclude that, "[b]ecause the indicia favoring a finding [that] the contractors are employees are clearly outweighed by evidence of entrepreneurial opportunity, the Board cannot be said to have made a choice between two fairly conflicting views." Slip Op. at 20. They reach this conclusion by giving the entrepreneurial opportunity factor a weight, and analyzing it in a way, that the common law of agency -- as construed by the courts and the NLRB -- does not. Although the indeterminate nature of the common-law test may be problematic, and although the Board may have some room to modify it, this court cannot. Because the Board's decision reflects a "choice between two fairly conflicting views," we cannot displace it. *United Ins.*, 390 U.S. at 260.

We can and should, however, reject the Board's unexplained refusal to give FedEx a fair opportunity to make its case under the appropriate test. Accordingly, I would remand the case for further proceedings.

## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board ("the Board") certify the following:

(A) Parties and Amici: FedEx Home Delivery, the petitioner/cross-respondent herein, was a respondent in the case before the National Labor Relations Board ("the Board"). The Board is the respondent/cross-petitioner herein, and the Board's General Counsel was a party in the case before the Board. The International Brotherhood of Teamsters, Local No. 25, which intervened here on the side of the Board, was the charging party before the Board. The American Trucking Associations, Inc. and the U.S. Chamber of Commerce are participating as amici curiae in support of FedEx. The Washington Legal Foundation, U.S.; the Association, Business and Industry Council; and the Allied Educational Foundation are participating as amici curiae in support of the Board.

(B) Ruling Under Review: This case involves a petition for review and a cross-application for enforcement of the Board's Decision and Order issued on September 28, 2007, and reported at 351 NLRB No. 16.

(C) Related Cases: This case has not previously been before this Court or any other court. Board counsel are unaware of any related cases pending before, or about to be presented before, this Court or any other court. However, Counsel is aware that a class action suit on behalf of FedEx Ground and Home Delivery

drivers challenging their designation by FedEx as independent contractors is pending in the U.S. District Court for the Northern District of Indiana: *In re FedEx Ground Package System, Inc., Employment Practices Litigation*, Cause No. 3:05-MD-527 RM (MDL-1700), 2007 WL 3027405, 69 Fed.R.Serv.3d 334, 42 Employee Benefits Cas. 1020 (N.D. Ind. 2007).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

| | | |
|---|---|---|
| FEDEX HOME DELIVERY, A SEPARATE OPERATING DIVISION OF FEDEX GROUND PACKAGE SYSTEM | * | |
| Petitioner/Cross-Respondent | * | No. 07-1391 |
| v. | * | |
| NATIONAL LABOR RELATIONS BOARD | * | Board Case No. 1-CA-44037 |
| Respondent/Cross-Petitioner | * | |
| and | * | |
| INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL NO. 25 | * | |
| Intervenor | * | |

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the Board has delivered by hand to the Court 20 copies of the Board's petition for rehearing, and suggestion for rehearing en banc, in the above-captioned case, and has served two copies of the petition by overnight mail upon the following counsel at the addresses listed below:

Charles I. Cohen, Esq.
Morgan, Lewis & Bockius, LLP
1111 Pennsylvania Ave. NW
Washington, DC 20004

Michael A. Feinberg
Renee Josephine Bushey
Jonathan M. Conit
Feinberg, Campbell & Zack
177 Milk Street, Suite 300
Boston, MA 02109

Robert Diggs, Jr.
ATA Litigation Center
2200 Mill Road
Alexandria, VA 22314-4677

Adam Charles Sloane
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006-1101

Robin S. Conrad
National Chamber Litigation Center
1615 H Street, NW
Washington, DC 20062

Timothy W. Wiseman
Scopelitis, Garvin, Light,
Hanson &Feary, P.C.
10 West Market Street
Suite 1500
Indianapolis, IN 46204

Stefano Moscato
National Employment Lawyers
Association
44 Montgomery Street, Suite 2080
San Francisco, CA 94104

Catherine K. Ruckelshaus
National Employment Law
Project
80 Maiden Lane, Suite 509
New York, NY 10038

Richard A. Samp
Daniel J. Popeo
Washington Legal Foundation
2009 Massachusetts Avenue, NW
Washington, DC 20036

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 4th day of June 2009

**FedEx Home Delivery, A Separate Operating Division of FedEx Ground Package System, Inc. *and* International Brotherhood of Teamsters, Local Union 25.** Cases 1–CA–44037 and 1–CA–44038

September 28, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND KIRSANOW

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to charges filed on July 12, 2007,[1] in Cases 1–CA–44037 and 1–CA–44038, the General Counsel issued the consolidated complaint on July 26, 2007,[2] alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certifications in Cases 1–RC–22034 and 1–RC–22035. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Sections 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, alleging affirmative defenses, admitting in part and denying in part the allegations in the complaint.

On August 13, 2007, the General Counsel filed a Motion for Summary Judgment. On August 15, 2007, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the Union's certification on the basis of its contentions, raised and rejected in the representation proceedings, that the contractors and swing contractors included in the unit are not employees as defined in the Act, and that the Union engaged in objectionable conduct prior to the election that had the tendency to mislead voters.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceedings. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding.[3] See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.[4]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a separate operating division of FedEx Ground Package System, Inc., with offices and places of business at 375 Ballardvale Street and 8 Jewel Drive in Wilmington, Massachusetts (the Wilmington facilities), has been engaged in the business of interstate package pick-up and delivery services.

Annually, the Respondent, in conducting its business operations described above, purchases and receives at its Wilmington facilities goods valued in excess of $50,000 directly from points located outside the Commonwealth of Massachusetts.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act[5] and that the International Brotherhood of

[1] The Respondent's answer to the consolidated complaint states that it is without knowledge as to when the charges were filed, but admits that the charges were served about July 12, 2007. Copies of the charges and the certificates of service are included in the documents supporting the General Counsel's motion, and they show the filing date as alleged. The Respondent does not contest the authenticity of these documents.

[2] The August 26, 2007 date as stated in the Consolidated Complaint is corrected to read July 26, 2007, consistent with the Amendment to Consolidated Complaint.

[3] In the underlying representation proceeding, Chairman Battista dissented from the Board's denial of the Respondent's request for review of the Regional Director's decision that the Respondent's route drivers and swing drivers are employees and not independent contractors. Contrary to his colleagues, he would have granted review of the refusal to permit the Respondent to introduce systemwide evidence concerning the number of route sales and the profits on these sales because such evidence may be relevant to whether the drivers have an entrepreneurial interest in their positions. While he remains of the view that review was warranted, he agrees that the Respondent has not raised any new matters that are properly litigable in this unfair labor practice case. See *Pittsburgh Plate Glass v. NLRB*, 313 U.S. 146, 162 (1941).

[4] We therefore deny the Respondent's request that the complaint be dismissed.

[5] The Respondent in its answer denies the conclusory allegations in par. 4 of the amended consolidated complaint that it is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. However, the Respondent's answer admits the underlying factual allegations that annually it purchases and receives at its Wilmington facilities goods valued in excess of $50,000 directly from points located outside the Commonwealth of Massachusetts. These admissions are sufficient to establish that the Respondent is engaged in commerce. See *Siemons Mailing Service*, 122 NLRB 81 (1959). Fur-

Teamsters, Local Union 25, is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

### *A. The Certification*

Following the representation elections held on October 20, 2006, the Union was certified on June 18, 2007, as the exclusive collective-bargaining representative of the employees in the following appropriate units:

> The Ballardvale Street unit:
>
> All full-time and regular part-time contractors and swing contractors employed by Respondent at its 375 Ballardvale Street facility in Wilmington, Massachusetts, but excluding temporary drivers, helpers employed by contractors, package handlers, guards, and supervisors as defined in the Act.
>
> The Jewel Drive unit:
>
> All full-time and regular part-time contractors and swing contractors employed by Respondent at its 8 Jewel Drive facility in Wilmington, Massachusetts, but excluding temporary drivers, helpers employed by contractors, package handlers, guards, and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

### *B. Refusal to Bargain*

By separate letters dated June 22, 2007, the Union requested that the Respondent bargain with it as the exclusive collective-bargaining representative of the Ballardvale Street unit and the Jewel Drive unit. Since about June 28, 2007, the Respondent has refused to recognize and bargain with the Union. We find that this failure and refusal constitutes an unlawful refusal to recognize and bargain in violation of Section 8(a)(5) and (1) of the Act.

## CONCLUSION OF LAW

By failing and refusing since June 28, 2007, to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the Ballardvale Street unit and the Jewel Drive unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

## ORDER

The National Labor Relations Board orders that the Respondent, FedEx Home Delivery, a Separate Operating Division of FedEx Ground Package System, Inc., Wilmington, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with International Brotherhood of Teamsters, Local Union 25, as the exclusive collective-bargaining representative of the employees in the Ballardvale Street unit and the Jewel Drive unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate units on terms and conditions of employment, and, if an understanding is reached, embody the agreement in a signed agreement:

> The Ballardvale Street unit:
>
> All full-time and regular part-time contractors and swing contractors employed by Respondent at its 375 Ballardvale Street facility in Wilmington, Massachusetts, but excluding temporary drivers, helpers employed by contractors, package handlers, guards, and supervisors as defined in the Act.
>
> The Jewel Drive unit:
>
> All full-time and regular part-time contractors and swing contractors employed by Respondent at its 8 Jewel Drive facility in Wilmington, Massachusetts, but excluding temporary drivers, helpers employed by contractors, package handlers, guards, and supervisors as defined in the Act.

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ther, in the underlying representation proceedings, the Respondent did not contest the finding that it was an employer engaged in commerce. Accordingly, we find that the Respondent's denial in its answer does not raise any issues warranting a hearing regarding this allegation. See, e.g., *Spruce Co.*, 321 NLRB 919 fn. 2 (1996), and cases cited there.

(b) Within 14 days after service by the Region, post at its Ballardvale Street and Jewel Drive facilities in Wilmington, Massachusetts, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 28, 2007.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 28, 2007

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter N. Kirsanow, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with International Brotherhood of Teamsters, Local Union 25, as the exclusive collective-bargaining representative of the employees in the Ballardvale Street and Jewel Drive bargaining units.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining units:

The Ballardvale Street unit:

All full-time and regular part-time contractors and swing contractors employed by Respondent at its 375 Ballardvale Street facility in Wilmington, Massachusetts, but excluding temporary drivers, helpers employed by contractors, package handlers, guards, and supervisors as defined in the Act.

The Jewel Drive unit:

All full-time and regular part-time contractors and swing contractors employed by Respondent at its 8 Jewel Drive facility in Wilmington, Massachusetts, but excluding temporary drivers, helpers employed by contractors, package handlers, guards, and supervisors as defined in the Act.

FEDEX HOME DELIVERY, A SEPARATE OPERATING DIVISION OF FEDEX GROUND PACKAGE SYSTEM, INC.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

01-CA-44037-001-0

FEDEX HOME DELIVERY, A SEPARATE OPERATING DIVISION OF FEDEX GROUND PACKAGE SYSTEM, INC.

| Activity Date (yyyy/mm/dd) | Activity Comment |
|---|---|
| 2011/07/05 | Sent to Records 2 vols of orig trans in 1-RC-22034 & 1-RC-22035. (dw) |
| 2011/07/05 | Rent to the Region: 4 vols of trans, 3 vols of exhs, 1 Regional Office file & 4 disks in 1-RC-21966. (dw) |
| 2010/07/27 | Sent to Region 2, Regional office files, 10 vols of trans & 2 vols of exhs in 1-RC-22034/1-RC-22035. (dw) |
| 2010/07/26 | Sent to Records xtra papers. (dw) |
| 2010/07/20 | Sent to records 3 formal files, 1 informal file & 3 vols of exhs in 1-RC-22034. (dw) |
| 2010/07/19 | Sent to Region 4 via usps 20 vols of trans., 5 vols of exhs., 4 Regional office files & 19 disks in 4-RC-20974. Also sent 2 vols of trans., 1 vol of exhs. & 2 disks in the Supoena Record Hearing (2/22/05) 2 of 4-RC-20974. |
| 2010/07/14 | Sent to Region 22 via usps 12 vols of trans., 2 files & brs in 22-RC-12508, Fedex Ground Package System, Inc. (dw) |
| 2009/09/29 | Rec'd Mandate issued on 9.18.09. (ML) |
| 2009/09/08 | Rec'd ELECTRONIC, Per Curiam Order fld 9.4.09, adv'ing that upon consideration of respondent's and intervenor's petitions for panel rehearing, it is ordered that the petitions be denied. (ML) |
| 2009/09/08 | Rec'd ELECTRONIC, Per Curiam Order, En Banc, fld on 9.4.09, denying petitions for rehearing en banc. (ML) |
| 2009/07/06 | Rec'd ELECTRONIC, notice adv'ing response fld by Fedx Home to petition for rehearing en banc on 7.1.09. (ML) |
| 2009/07/06 | Rec'd by FEDEX, Response to petitions for rehearing and rehearing en banc on 7.1.09. (ML) |
| 2009/06/17 | Rec'd ELECTRONIC, Order fld 6.16.09, adv'ing that upon consideration of the petitions for rehearing en banc, it is ordered on the ct's own motion, that w/I 15 days of the date of this order, petitioner file a response to the petitions for rehearing en banc, not to exceed 15 pages. Response to petition - due 7.1.09. (ML) |
| 2009/06/15 | Rec'd ELECTRONIC, adv'ing that corrected Petition fld by Respondent NLRB in 07-1391, Pet NLRB in 07-1436 for rehearing, for rehearing en banc on 6.12.09. (ML) |

| | |
|---|---|
| 2009/06/15 | Rec'd Intervenor IBT, Local Union No. 25's Pet for rehearing or rehearing en banc fld on 6.4.09. (ML) |
| 2009/06/12 | Hand Delivery-Corrected copy of brief and to fedex to counsel. (VH) |
| 2009/06/05 | Rec'd ELECTRONIC, notice adv'ing Petition fld by Intervenor for Respondent IBT, Local 25 for rehearing, for rehearing en banc on 6.5.09. (ML) |
| 2009/06/04 | Hand Delivery-Petition for rehearing, and suggestions for rehearing en banc, on behalf of the NLRB to the court and FEDEX to counsel. (VH) |
| 2009/04/21 | Rec'd ELECTRONIC, OPINION fld 4.21.09. (ML) |
| 2009/04/21 | Rec'd ELECTRONIC, Order fld 4.21.09, adv'ing that the clerk w/hold issuance of the mandate until 7 days aft disposition of any timely pet for rehearing or pet for rehearing en banc. (ML) |
| 2009/04/09 | Sent to Region via fed express, per request, 20 disks of hearing (4-RC-20974) to attn of Lorraine Murray. (dw) Returned via fed express on 4/20/09. (dw) |
| 2008/11/07 | Rec'd ELECTRONICALLY, Courtroom min. for OA., the ct opened on 11.7.08, at 9:43 a.m., was heard as case No. 1 of 2 and argued bef the ct by: Cruz-Pet; Isbell-Respndnt; and Bushey-Intervenor. (ML) |
| 2008/11/06 | Rec'd ELECTRONICALLY, fld on 11.5.08 Notification to the ct fr Atty Bushey intending to present OA on behalf of Intervenor. The oral argument is scheduled for 11.7.08 and w/argue 5 min.. (ML) |
| 2008/11/05 | Rec'd ELECTRONICALLY, Order fld on 11.5.08, adv'ing of intervenor's motion for leave to present oral argument, and it appearing respndnt is willing to cede intervenor 5 min. of OA time, it is ordered that the motion be granted. (ML) |
| 2008/11/04 | Rec'd FEDEX, ltr dtd 10.31.08, Oral Argument set for 11.7.08. (ML) |
| 2008/11/04 | Rec'd UPS dtd 11.3.08, Intervenor's mot to leave to present oral argument. Intervenor request that counsel for Intervenor be allowed to present oral argument and share the allotted time to respndnt. (ML) |
| 2008/10/22 | Rec'd UPS, 2 copies of Intervenor's response to Petitioner's conditional motion to remand. (ML) |
| 2008/10/10 | Rec'd FEDEX, Petitioner's conditional mot to remand w/enclosures.(ML) |
| 2008/09/30 | Rec'd Order fld on 9.24.08, adv'ing that the case be scheduled for oral argument on 11.7.08, at 9:30 a.m., in Ctroom 11 on the 4th fl., bef Cir. Judges Garland and Brown and Senior Cir. Judge Williams. (ML) |

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|---|---|
| 2008/07/31 | Rec'd 2 copies of Supplemental Brief of Petitioner/Cross Respondent -responding to brief of Amici Curiae Wash. Legal Foundation, U.S. Bus. And industry Council, a/Allied Ed. Foundation. (ML) |
| 2008/07/14 | Rec'd Order filed 7.9.08, adv'ing the mot of the Nat'l Employmt lawyers assn. and the Nat'l Employmt Law Proj. for leave to file an amicus curiae brief,and the motions of both parties NELA and NELP for leave to file an appendix; the mot of the Wash. Legal Fndation, the US Bus. & Indus. Council and the Allied Ed. Fndation for leave to file an amicus curiae brief, and the opposition to the mot 's for leave to file amicus curiae briefs; the reply; the motion to file a surreply; the lodged surreply and the lodged amicus briefs; and ordered that the mot to file a surreply be granted and further ordered that both parties NELA and NELP to file be denied, and the appendix be dismissed as moot; also the mot of the Wash. Legl Fnd. And the US Bus. And Ind. Council to file brief be granted. (ML) |
| 2008/06/30 | Rec'd ltr dtd. 6.24.08, enclosing copies of the corrected Table of Cases, Statutes and Other Authorities for the final br of intervenor, IBT. (ML) |
| 2008/06/25 | Mld to ct & cnsl, amended cert list. (dw) |
| 2008/06/24 | Rec'd 2 copies of the final brief of Petitioner/Cross Respondent and 2 copies of the final reply brief of Petitioner/Cross Respondent on 6.23.08. (ML) |
| 2008/06/23 | REC'D-Brief of intervenor international brotherhood of teamsters, local union no. 25. (VH) |
| 2008/06/20 | MAILED- Final brief to the court and counsel. (VH) |
| 2008/06/12 | REC'd-Petition for review and cross-application for enforcement of an order of the NLRB, motion and appendix. (VH) |
| 2008/06/10 | REC'd-Joint appendix. (VH) |
| 2008/06/09 | Rec'd Notice that Final Br of Amici Curiae was Fld on 3.31.08, dated 6.4.08 & signed by Sfsm C. Sloane. (dw) |
| 2008/06/02 | REC'd-Reply brief of petitioner/cross-respondent. (VH) |
| 2008/05/20 | REC'd-Brief of washington legal foundation, united states business and industry council, and allied educational foundation as AMICI CURIAE in support of respondent/cross-petitioner. (VH) |
| 2008/05/05 | Rec'd Reply Br of Washington Legal Foundation, United States Business and Industry ouncil, abd Allied Educations Foundation in Support of Mot for Leave to File Amicus Curiae Br, dated 4.28.08 and signed by Daniel J. Popeo. (dw) |

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|---|---|
| 2008/05/02 | Rec'd Petr/Cross-Resp's Mot for Leave to File a Surreply, dated 5.1.08 and signed by Charles I. Cohen. (dw) |
| 2008/04/30 | MAIL-Proof brief to the court and to counsels. (VH) |
| 2008/04/23 | Rec'd Petr/Cross-Resp's Response to Mots for Leave to File Amicus Curiae Brs, dated 4.22.08 & signed by Charles I. Cohen. (dw) |
| 2008/04/21 | Rec'd Mot of Washington Legal Foundation, U. S. Business and Indusatry Council. And Allied Educational Foundation for Leave to File Amicus Curiae Br in Support of Resp/Cross-Petr, dated 4.16.08 & signed by Daniel J. Popeo. (dw) |
| 2008/04/16 | Rec'd fr Nat'l Employment Lawyers Assoc & Nat'l Employment Law Project Mot for Leave to File a Br as Amicus Curiae & Corporate Disclosure Stmt, bothe dated 4.11.08 & signed by Catherine K. Ruckelshaus & Harold L. Lichten. (dw) |
| 2008/04/08 | Rec'd 21 vols of trans & 4 Regional Office files in 4-RC-20974. (dw) |
| 2008/04/02 | REC'D Breif of amici curiae american trucking associations, inc. and chamber of commerce of the united states of america in support of petitioner. (VH) |
| 2008/04/01 | REC'D F/PETITIONER'S COUNSEL ERRATA FOR THE TABLE OF AUTHORITIES OF PETITIONER/CROSS-RESPONDENT'S BRIEF.(LC) |
| 2008/03/25 | Rec'd fr region the disks in 1-RC-21966. Also rec'd the disks, trans & exhs in 4-RC-20974. (dw) |
| 2008/03/19 | Rec'd fr region the trans, exhs & files in 1-RC-21966. (dw) |
| 2008/03/18 | REC'D Brief of petitioner/cross-respondent. (VH) |
| 2008/03/17 | Rec'd fr Region via fedex 10 disks. (dw) |
| 2008/01/30 | recd briefing schedule fld 1.25.08 adv'ing pet brief Mar 17, 2008, Respond. Breif Apr 16, 2008, Intervenor for respond. Brief May 1, 2008, Petit. Reply brief May 15, 2008, Deferred Appendix May 22, 2008, final breif Jun 5, 2008.DS |
| 2008/01/07 | Recd order granting motionof American Trucking Asso. and the Chamber of Commerce for leave to participate as amici curiae in support of petitioner is granted. (DS) |
| 2007/12/07 | Mld to Ct & cnsl the amended cert list. (dw) |
| 2007/12/07 | Rec'd fr Chamber of Commerce Rule 26.1 Corporate Disclosure Stmt, dated 11.30.07 & signed by Robin S. Conrad. (dw) |
| 2007/12/04 | Rec'd cy of entry of appearance along with cy of joint motion for leave to participate as amicus curiae.db |

| | |
|---|---|
| 2007/11/29 | Petr's cnsl picked up xeroxed exhs by courier & pd for exhs by Check No. 133211 in the amount of $31.32. Check taken to finance. (dw) |
| 2007/11/28 | Rec'd fr Region 2 boxes of dupl trans & exhs. (dw) |
| 2007/11/26 | Rec'd fax fr Petr's cnsl requesting ccs of the exhs., dated 11.26.07 & signed by Denise M. Dellaratta. (dw) |
| 2007/11/19 | Mld to Ct, Cnsl & Ptys the Cert Index. (dw) |
| 2007/11/14 | Rec'd Answer to the Bd's Coss-Applic, dated 11.14.07 & signed by Charles I. Cohen. (dw) |
| 2007/11/09 | Rec'd order fld 11.5.07 gnt'ing International Brotherhood of Teamsters, Local No. 25's mot to intervene. Cc to legal tech. (dw) |
| 2007/11/02 | Rec'd cc of ltr dated 11.2.07 adv'ing that encl'd are the following documents: docketing stmt, stmt of issues, certificate as to ptys, rulings & related cases, stmt regarding deferred appx & 2 ccs of the underlying decision. (ccs of named documents attached.) Signed by Charles I. Cohen. (dw) |
| 2007/10/24 | MAILED-Appearance form for Julie Broido and Kellie Isbell to the court and opposing counsel. |
| 2007/10/17 | Rec'd fr region 2 files, 2 vols of exhs & 10 vols of trans in 1-RC-22034 & 1-RC-22035. (dw) |
| 2007/10/09 | Rec'd by mail from Union Motion for Leave to Intervene on behalf of International Brotherhood of Teamsters, Local No. 25.(LC) |
| 2007/10/09 | REC'D F/CT PETITION FOR REVIEW & CORP. DISCLOSURE STATEMENT FILED ON 10.03.07 AND DOCKETED UNDER 07-1391.(LC) |
| 2007/10/09 | Rec'd F/ Ct Order docketing etition for review on 10/1/07. Appearance form due 11/19/1007;Certified index to record due 11/19/2007. Further order briefing is deferred. (BB) |
| 2007/10/04 | Rec'd via email fr the region a Report and Recommendation for Institution of Enforcement Proceedings, dated 10.4.07. (dw) |
| 2007/10/03 | Rec'd unfld cc of the pet for review along with a cc of the corporate disclosure stmt, both dated 10.1.07 & signed by Charles I. Cohen. (dw) |

# National Labor Relations Board

## Docket Activity for 01-CA-044037

| Date | Activity |
|---|---|
| 11/12/2009 | Memo fm GC to BD advising that a determination was made not to seek certiorari in this case/syh |
| 4/21/2009 | D.C. Cir. Order No. 07-1391 consolidated with 07-1436 granting the petition for review, vacating the Board's order and denying the cross-application for enforcement/(J-6083)/(syh) |
| 9/28/2007 | Decision and Order (351 NLRB No. 16)/syh |
| 8/29/2007 | Resp's (Hand Delivered) response to Order Transferring Proceeding to the Board and Notice to Show Cause, rec'd & ack'd (ptys srvd) (lma) |
| 8/15/2007 | Order Transferring Proceeding to the Board and Notice to Show Cause/why the GC's motion should not be granted/briefs due on or before 8/29/07/syh |
| 8/13/2007 | GC's Motion to Transfer Proceeding to the Board and For summary Judgment, w/exhibits attached dated 8/10/07. |

**Abbreviations Description**

| | | | |
|---|---|---|---|
| ACC | Accepted | FXD | Faxed |
| ACK'D | Acknowledged | GC | General Counsel |
| ASST | Assistant | LTR | Letter |
| ATTACH | Attachment(s) | ML | Mail |
| ATTMTS | Attachment(s) | MLD | Mailed |
| BRF | Brief | MTN | Motion |
| CNSL | Counsel | PTYS | Parties |
| CP | Charging Party | REC'D | Received |
| DEC | Decision | RESPS | Respondents |
| EMPL'S | Employees | SJ | Summary Judgment |
| EOT | Extension of Time | SRVD | Served |
| EXT | Extension | SUPP | Supplemental |
| FM | From | SVD | Served |
| FX | Fax | W/ | With |